SUPREME COURT, U. S.
OCT 7 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5391

CHRISTOPHER J. AQUILA, WILLIAM G. AYLWARD, CARL A. DODARO, JR., DIANNE F. DODARO, JOSEPHINE A. HOWELL, EILEEN PLUMMER and BRUNO VITLONE,

Petitioners

vs.

HAROLD E. BRICHFORD, JOHN R. ENGLEHART, RALPH PETTIFER, JOHN H. HAGER, CECIL R. LUTZ, HUGH D. PALLISTER, DONALD M. PARK, WILLIAM G. RYAN, JOHN TIGUE, SR., THE CITY OF WILLOUGHBY, A Municipal Corporation, and T.E.K. & ASSOCIATES, A Partnership

Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Ralph Rudd,
Rudd, Karl, Sheerer, Lybarger and Campbell Co., L.P.A.
33 Public Square, Suite 210
Cleveland, Ohio 44113
Phone 216,241-3646
Attorneys for Petitioner

October 7, 1975

(Attorneys for Respondents on Inside of Back Cover)

TABLE OF CONTENTS

TABLE OF CONTENTS----------i

TABLE OF AUTHORITIES---------- v

(a) OPINION BELOW----------1

(b) GROUNDS OF JURISDICTION----------1

(c) QUESTIONS PRESENTED FOR REVIEW------2

(d) THE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RESOLUTION INVOLVED----------5

(e&g) STATEMENT OF THE CASE----------7

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITIONS BELOW----------7

B. THE FACTS----------11

(h) ARGUMENT----------14

QUESTION 1----------14

QUESTION 2----------17

QUESTION 3----------24

QUESTION 4----------25

QUESTION 5----------33

CONCLUSION----------37

(i) OPINIONS BELOW----------40

CERTIFICATE OF SERVICE----------41

APPENDIX---------- 1a

CONSTITUTION OF THE UNITED STATES------- 1a

AMENDMENTS TO THE CONSTITUTION-------- 1a

AMENDMENT I
RELIGION, FREE SPEECH, ETC.-------- 1a

AMENDMENT XIV
RIGHTS OF CITIZENS---------- 1a

UNITED STATES CODE---------- 2a

TITLE 28---------- 2a
§1331---------- 2a
§1343---------- 3a

TITLE 42---------- 4a
§§1983 and 1985---------- 4a
§ 1988---------- 5a

CONSTITUTION OF THE STATE OF OHIO------- 7a

ARTICLE II §1f [Power of Municipalities]-- ---------- 7a

OHIO REVISED CODE---------- 7a
§731.29---------- 7a
§731.30---------- 8a
§733.56---------- 9a

CHARTER OF THE CITY OF WILLOUGHBY-------11a

ARTICLE III, Section 11. Effective Date of Ordinances and Resolutions--11a

ARTICLE VI. Section 1. Planning Commission, Organization----------12a

APPENDIX (cont'd)

CHARTER OF THE CITY OF WILLOUGHBY (cont'd)

ARTICLE VI. (cont'd)

Section 2. Planning Commission Powers and Duties----------13a

Section 3. General Plans and Zoning Ordinances----------13a

Section 4. Board of Zoning Appeals----------14a

Section 5. Constitution----------15a

Section 6. Appropriations---------15a.

ARTICLE IX
INITIATIVE, REFERENDUM AND RECALL--15a

CODIFIED ORDINANCES OF WILLOUGHBY-------16a

CHAPTER 1133 AMENDMENTS----------16a

1133.01 CONDITIONS FOR AMENDING----16a
1133.03 ACTION BY PLANNING COMMISSION; PUBLIC HEARING----17a
1133.04 ACTION BY COUNCIL; PUBLIC HEARING----------18a
1133.05 CURRENT RECORD----------19a

BILL NO. 1973-227----------20a

MINUTES OF SPECIAL MEETING OF COUNCIL August 21, 1973----------22a

BUSINESS----------23a

APPENDIX (cont'd)

MINUTES OF SPECIAL MEETING OF COUNCIL
August 21, 1973 (cont'd)

BILL NO. 1973-227----------23a

ROLL CALL----------23a

BILL NO. 1973-228----------24a

ROLL CALL----------24a

JUDGMENT
COURT OF COMMON PLEAS, LAKE COUNTY
8-22-73----------25a

MEMORANDUM OPINION AND ORDER U.S.
DISTRICT COURT, Nov. 21, 1973------29a

ORDER
U.S. DISTRICT COURT 6-24-74----------40a

UNITED STATES COURT OF APPEALS
OPINION June 6, 1975----------42a

ORDER DENYING PETITION FOR RE-
HEARING July 9, 1975----------45a

ORDER
U.S. COURT OF APPEALS August
14, 1975----------46a

TABLE OF AUTHORITIES

CASES

Anderson v. Haas, 341 F. 2d 497, 3rd Cir., 1965----------23
Briscoe v. Kusper, 435 F. 2d 1046, 1053 (7th Cir., 1970)----------18
Buchanan v. Warley, 245 U.S. 60, 74, 62 L.Ed. 149, 160, 38 S.Ct. 16, 1917----20,23
Cooper v. Aaron, 358 U.S. 1, 15, 3 L.Ed. 2d 5, 15, 78 S.Ct. 1401, 1958----------21,23
Gomillion v. Lightfoot, 364 U.S. 399 (1960)----------18
Goosby v. Osser, 409 U.S. 512, 518, 35 L. Ed. 2d 36, 92 S.Ct. 854, 1973--------28
Hagans v. Lavine, 415 U.S. 528, 39 L.Ed. 2d 577, 94 S.Ct. 1372, 1974----27,30,31,33
Harris County Commissioners Court v. Moore, 420 U.S. 77, 43 L.Ed 2d 32, 38-39, 95 S.Ct. 870, 1975----------35,36
Hawkins v. Town of Shaw, Miss., 461 F.2d 1171, 5th Cir., 1972----------23
Hurn v. Oursler, 289 U.S. 238, 246, 77 L.Ed 1148, 1154, 53 S.Ct. 586, 1933-----29
Miami Herald Publishing Company v. Tornillo, 418 U.S. 241, 259, 41 L.Ed 2d 730, 742, 94 S.Ct. 2831, 1974----------28
Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed. 2d 492, 505, 1961----------21
N.A.A.C.P. v. Alabama, 357 U.S. 449, 461, 2 L.Ed 2d 1488, 1499, 78 S.Ct. 1163, 1958----------20,22

N.A.A.C.P. v. Button, 371 U.S. 415, 438-9, 9 L.Ed 2d, 405, 421, 83 S.Ct. 328, 1963----------22,28
Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 2nd Cir., 1968----------23
Palmer v. Thompson, 403 U.S. 217, 226, 29 L.Ed. 2d 438, 445, 91 S.Ct. 1940, 1945, 1971----------22
Parker v. McKeithen, 488 F. 2d 553, 5th Cir., 1974----------23
Screws v. United States, 325 U.S. 91, 89, L.Ed. 1495, 65 S.Ct. 1031, 162 ALR 1330----------21
United Mine Workers v. Gibbs, 383 U.S. 715, 725, 16 L.Ed. 2d 218, 228, 86 S.Ct. 1130, 1966----------29,30,31
United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222, 19 L.Ed. 2d 426, 430, 88 S.Ct. 353, 1967----------28
United States v. Classic, 313, U.S. 299, 85 L.Ed. 1368, 61 S.Ct. 1031----------21
Watson v. Memphis, 373 U.S. 526, 537 10 L.Ed. 2d 529, 538, 83 S.Ct. 1314, 1963----------22,23
Whirl v. Kern, 407 F.2d 781, 5th Cir., 1969----------23

U. S. CONSTITUTION

First Amendment----------5,8,28,1a
Fourteenth Amendment----------5,8,1a

U. S. CODE

18 U.S.C. Sec. 242----------21
28 U.S.C. Sec. 1254----------1
28 U.S.C. Sec. 1331; P.L. 85-554, Sec. 1; 72 Stat. 415----------5,7,2a
28 U.S.C. Sec. 1343; Pub. L. 85-315, Part III, Sec. 121; 71 Stat. 637----------5,7,3a
28 U.S.C. Sec. 2201; Pub. L. 85-508, Sec. 12(p); 72 Stat. 349 5,7,3a-4a
42 U.S.C. Sec. 1983; R.S. Sec. 1979----------3,5,7,18,19,20,21,4a
42 U.S.C. Sec. 1985; R.S. Sec. 1985; R.S. Sec. 1980--------5,7,4a-5a
42 U.S.C. Sec. 1988; R.S. Sec. 722----------5,7,5a-6a

SUPREME COURT RULES

Rule 19, Sec. 1(b) 16,17,25,33,35,37

CONSTITUTION OF THE STATE OF OHIO

Article II, Sec. 1f----------5,7a

OHIO REVISED CODE

Sec. 731.29-.30----------13,15,7a-9a
Secs. 733.56, 733.59----------7,9a-10a

WILLOUGHBY CITY CHARTER

Article III, Sec. 11------6,12,14,16,11a-12a
Article IV, Secs. 1-6--------8,12,26,12a-15a
Article IX----------6,15a

WILLOUGHBY CODIFIED ORDINANCES

Chapter 1133----------3,6,8,12,13,14,
14,24,26,27,29,30,31,16a-20a

(a) OPINIONS BELOW

The opinions of the district court were filed on November 21, 1973, and June 24, 1974. They were not published.

The opinion of the Court of Appeals was filed on June 6, 1975, and was not published.

All three opinions are appended hereto. 29a, 40a, 42a.

(b) GROUNDS OF JURISDICTION

The judgment of the Court of Appeals was made and filed on June 6, 1975. 42a.

A petition for rehearing (denominated "Motion for Reconsideration") filed June 18, 1975, was denied by an order filed on July 9, 1975. 45a.

A motion by plaintiffs appellant to clarify judgment was overruled by an order filed on August 14, 1975. 46a.

No extension of time for filing the petition for certiorari has been requested or granted.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Sec. 1254:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...."

(c) QUESTIONS PRESENTED FOR REVIEW

A re-zoning ordinance to allow condominiums to be built on land previously zoned for single family residences on 5-acre lots was opposed by the petitioners by referendum petition. The City refused to certify the referendum petition to the Board of Elections, claiming errors in the manner of its circulation. Petitioners sued in state court for a writ of mandamus to compel certification, or alternatively for a declaration that the ordinance itself was invalid for procedural error in its passage by Council. The ordinance was ruled invalid because of procedural error, reinstating the original zoning classification. Validity of the referendum petition was not reached. The affected land owner sued the City alleging that the original zoning classification was unconstitutional, and the members of the City Council believed it would be so held. Nevertheless, they did not enact new and valid zoning, although there was time to do so before trial, but instead, after two

days of trial, they authorized by resolution with emergency clause a consent decree that permitted the same use of the land that would have been permitted by the original invalid re-zoning ordinance. The City's Charter and ordinance on zoning procedure permitted zoning amendment only by ordinance and only after two public hearings, but no ordinance was proposed or passed and no hearings were held. Plaintiffs sued in the U.S. District Court under 42 U.S.C. §1983 alleging deprivation of constitutional right by this avoidance of public hearings while, in effect, changing the zoning as if a valid ordinance had been passed. The district court held there was no violation of constitutional right. The Court of Appeals affirmed, saying the state law questions (on which the district court had rested its judgment, in large part) were for the state courts. Under these circumstances...

1. Did the Court of Appeals err in failing to reverse the district court's decision of the state law question?

Petitioners would answer YES.

2. Did the courts below err in holding that the case presented no violation of federal constitutional right?

Petitioners would answer YES.

3. The state law ground on which principally, the district court held that there was no violation of federal constitutional right was that the provisions for emergency legislation excused the avoidance of public hearings otherwise required for enactment of a zoning ordinance; the court of appeals did

not discuss this question, saying the state law questions were for the state courts, but nevertheless affirmed the district court's federal holding grounded largely on the district court's state law decision; did the court of appeals err in adopting the result while rejecting its ground without other adequate ground appearing?

Petitioners would answer YES.

4. Did the court of appeals err in its application of the abstention doctrine in that it decided the federal constitutional question (affirming the district court) while abstaining from decision of the state law question which might dispose of the case without necessity for decision of the federal constitutional question?

Petitioners would answer YES.

5. Did the Court of Appeals err in that while it remitted the plaintiffs to the state courts for decision of the state law questions, yet by affirming the decision of the district court it left the case in such posture that in state courts the plaintiffs would have to overcome substantial claims of res judicata with respect to both the state law question and the federal constitutional question decided by the district court?

Petitioners would answer YES.

(d) THE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RESOLUTION INVOLVED

The following constitutional provisions, statutes, ordinances, and resolution which the case involves are set out in the appendix at the pages respectively indicated.

United States Constitution, First and Fourteenth Amendments; 1a-2a.

28 U.S.C. Sec. 1331; P.L. 85-554, Sec. 1; 72 Stat. 415; 2a.

28 U.S.C. Sec. 1343, Pub. L. 85-315, Part III, Sec. 121; 71 Stat. 637; 3a.

28 U.S.C. Sec. 2201; Pub. L. 85-508, Sec. 12(p); 72 Stat. 349; 3a-4a.

42 U.S.C. Sec. 1983; R.S. Sec. 1979; 4a.

42 U.S.C. Sec. 1985; R.S. Sec. 1980; 4a-5a.

42 U.S.C. Sec. 1988; R.S. Sec. 722; 5a-6a.

Constitution of the State of Ohio, Article II, Sec. 1f; 7a.

Ohio Revised Code Sec. 731.29, 129 v 324, Sec. 1; 7a-8a.

O.R.C. Sec. 731.30; 102 v 211 (212); 8a-9a.

O.R.C. Sec. 733.56; 129 v 1817, Sec. 1; 9a.

O.R.C. Sec. 733.59; 129 v 1817, 10a.

O.R.C. Sec. 733.61; 95 v 317; 10a.

Charter of the City of Willoughby, Article III, Sec. 11; 11a-12a.

Charter of the City of Willoughby, Article VI; 12a-15a.

Charter of the City of Willoughby, Article IX; 15a.

Codified Ordinances of Willoughby, Part 11, Planning and Zoning Code, Chapter 1133, Amendments; 16a-20a.

Willoughby City Council Resolution, Bill No. 1973-227; 20a-22a.

Willoughby City Council, Minutes of Special Meeting of Council, August 21, 1973; 22a-24a.

(e) and (g) STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITIONS BELOW.

This is an action for declaratory and injunctive relief to redress deprivations by actions of the defendants acting under color of state law of rights and liberties of the Plaintiffs as citizens and residents of the United States, and through the Courts' pendent jurisdiction to enforce the Plaintiffs' rights as taxpayers of the City of Willoughby, Ohio, for the law to be obeyed by its public officials. A 5[1]. Federal jurisdiction was founded upon 28 U.S.C. Secs. 1331, 1343(3), 1343(4), and 2201, 42 U.S.C. Secs. 1983, 1985, and 1988. A 5, 2a-6a. As was alleged in the complaint, the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arose under the constitution and laws of the United States. A 5. Demand had been made pursuant to state law that the law director of the City of Willoughby take appropriate action to compel the Defendants to reverse their illegal action and proceed lawfully, and he had refused to do so. A 5, 15, 19, Ohio Revised Code Secs. 733.56, 733.59, 9a-10a.

The Plaintiffs are citizens, electors, and taxpayers of the City of Willoughby. A 5,

[1]References to "A" are to the Appendix filed in the Court of Appeals. References to "1a", etc. are to the Appendix to this petition for

15, 19. One of the original Plaintiffs, Arthur J. Hammond, gave notice by letter dated November 26, 1974, with copies to the District Court and Court of Appeals, that he no longer wished to be a Plaintiff Appellant in this action (A 94) and his name was omitted from the title of the appeal and from the petition. Another, Dan N. LaGatta, is not participating in this petition for certiorari.

The Defendants were the mayor and councilmen of the City of Willoughby, the City itself, its building and zoning inspector, and a partnership, T.E.K. & Associates, that owned land in the City that, beginning in 1972, T.E.K. had sought to have re-zoned to permit commercial development and construction of multi-family residences. A 5-6, 15, 19.

The heart of the Plaintiffs' claim is that the re-zoning ultimately was obtained, in effect, in 1973 by procedures that eliminated the two public hearings that Willoughby Charter and ordinances require for all proposals to amend the zoning map (A 9, 16, 57, 59-60; 12a-19a), thus depriving the Plaintiffs of opportunities for speech and petition for redress of grievances in violation of the First and Fourteenth Amendments of the United States Constitution and, because not done in accordance with the applicable rules, without due process of law, thus again violating the Fourteenth Amendment. A 9, 10, 16; 1a-2a.

The Plaintiffs sought preliminary and permanent injunctions. A 10. At a hearing on September 14, 1973, it was agreed that the preliminary injunction hearing would be consolidated with the hearing on the merits, which was set for October 2, 1973. Record, Clerk's notes, 9/14/73. On that day confer-

ence in chambers resulted in a hearing on October 3, 1973, at which stipulations were made as to the facts. A 17-54. Together with the pleadings and exhibits, these stipulations constitute the factual record of the case.

Meanwhile the defendants filed motions to dismiss for failure of the complaint to state a claim upon which relief could be granted (A 13, 14) and these motions were extensively briefed. See Record, briefs, and memoranda filed on September 14, 21; October 2 (by each defendant), 10 (two by plaintiffs). In addition, the defendants other than T.E.K. filed an answer to the complaint. A 15-16.

On October 26, 1973 the District Court entered its judgment in favor of the defendants, ruling that the plaintiffs had not established that their constitutional rights had been violated. A 70. The judgment stated that a memorandum opinion containing findings of facts and conclusions of law would follow. On motion of the plaintiffs (A 71) the October 26 order and judgment was vacated on November 21, (A 72; 29a) on the issuance of the Court's memorandum and opinion, again holding that the plaintiffs had failed to demonstrate that their constitutional rights had been violated (A 72; 29a-39a), and judgment was entered accordingly on November 23, 1973. A 81. Plaintiffs filed on December 3, 1973, their motion for amended findings of fact and conclusions of law or alternatively for a new trial. A 82-86. This was briefed by the plaintiffs (Record, December 7, 1973, January 16, 1974.) and the defendant T.E.K. (Record, January 7, 1974.) By leave of Court (A 87-88A, 89) the American Civil Liberties Union of Greater Cleveland filed a brief as amicus curiae in support of the Plaintiffs' motion for amended findings of fact and conclusions of law or alternatively for a new trial,

on April 15, 1974. Record. Although the attorney who up to that point had represented the defendants other than T.E.K. sought and obtained leave to file an Answer to the brief of the American Civil Liberties Union by May 10, 1974 on behalf of all of the defendants including T.E.K. (Record, April 26, 1974), no such Answer Brief was filed.

Meanwhile, On February 7, 1974, Plaintiffs filed a motion for leave to file a supplemental complaint alleging that T.E.K. had made no application for building permit, and alleging on information and belief that T.E.K. had abandoned its plans to build on its property in Willoughby and was endeavoring to sell its land. The proposed supplemental complaint would have stated also that defendant John R. Englehart had been replaced as a member of the Willoughby City Council by Plaintiff Arthur J. Hammond. This motion was denied on May 13, 1974.

On June 24, 1974 the District Court's order denying the Plaintiffs' motion for amended findings of fact and conclusions of law was issued and docketed. A 90-91. The Plaintiffs' notice of appeal was filed on July 18, 1974. A 92; 40a-41a.

After briefing and oral argument the Court of Appeals rendered its decision on June 6, 1975, affirming the judgment of the district court and saying that the state law issues were for the state courts.

A petition for rehearing, denominated motion for reconsideration, was filed by the plaintiffs appellant on June 18, 1975, and denied on July 9, 1975. A motion by the plaintiffs appellant to clarify the judgment was filed on July 22, 1975, and overruled by

the Court of Appeals on August 14, 1975.

B. THE FACTS

The Defendant T.E.K. bought land in Willoughby, Ohio, zoned for single family residences on 5 acre lots, S-5, and sought to develop it for commercial and multi-family use. A 5-6, 15, 19. The City Council passed and on September 20, 1972 the Mayor signed a re-zoning ordinance allowing what T.E.K. planned, and T.E.K. executed certain further covenants. A 6, 15, 19.

The plaintiffs are citizens and taxpayers of Willoughby. A 5, 15, 19. After the re-zoning was passed they circulated and filed a referendum petition to place the new ordinance before the people, but the City's Finance Director refused to certify it to the board of elections claiming it did not contain a sufficient number of valid signatures. A 7, 15, 20-21. Plaintiffs sued in Common Pleas Court to compel certification of the referendum petition or else to have the ordinance declared invalid on the ground it was not passed within 60 days after the Council's hearing on it. A 7, 15, 24. On April 25, 1973, the Common Pleas Court declared the ordinance invalid for the reason alleged (A 7-8, 15, 24), mooting the sufficiency of the referendum petition. The S-5 zoning of T.E.K.'s land was thus automatically reinstated.

By letter dated May 11, 1973, T.E.K.'s attorney protested the failure of the Council to pass the 1972 ordinance within 60 days following the Council's hearing on it, and Council's continued failure to re-zone the land

following the Common Pleas decision voiding the 1972 ordinance. A 8, 15, 24.

On May 14, 1973, T.E.K. filed suit in Common Pleas Court claiming the S-5 classification to be unconstitutional. A 8, 15, 24. Although the members of the City Council believed from the beginning of the T.E.K. suit that it probably would succeed they did not enact any new and probably valid zoning, although T.E.K. had demanded that they do so. A 8, 15, 24-25. Trial of the T.E.K. action took place on August 20 and 21, 1973. At a special meeting of the Council on the evening of August 21 it adopted with an emergency clause (A 64-65; 20a-24a) a resolution (A 62-63; 20a-22a) authorizing a consent decree (A 66-69; 25a-28a) to settle the T.E.K. suit, incorporating in the decree the provisions of the T.E.K. covenants of 1972 and the provisions of the invalid 1972 re-zoning ordinance. A 9, 16, 30, 66-69. On August 22, 1973, the consent decree was executed by the parties and issued by the Court of Common Pleas. A 9, 16, 30, 66-69; 25a-28a.

The Willoughby City Charter directs the Council to enact comprehensive zoning by ordinance. A 57; 13a. The Willoughby ordinance governing amendment of the zoning code or map provides that a proposed amendment shall be referred to the Planning Commission, and if a change in the zone map is proposed the Commission shall hold a public hearing. A 60, 18a. The ordinance also requires that Council also hold a public hearing on the amendment. A 59-60; 18a. The Charter provides that emergency legislation passed with explicit emergency clause by the affirmative vote of at least five members of the Council shall go into effect immediately. A 55, 11a-12a. State law incorporated by reference in the Charter

(R.C. Secs. 731.29-731.41; 7a-9a.) bars referendum with respect to such an ordinance or resolution, but the emergency clause does not affect the requirement that a zoning amendment be referred to the Planning Commission, that it hold a public hearing on any proposed change in the zone map, and that the City Council hold a public hearing on any amendment of the zoning code or map. A 59-60; 16a-19a.

(i) ARGUMENT

Question 1: Did the Court of Appeals Err in Failing to Reverse the District Court's Decision of the State Law Question?

Petitioners would answer YES.

The State law question is whether the adoption of an emergency clause and passage by the two-thirds vote required for an emergency measure authorized the City Council, in effect, to enact new zoning without following the procedures established by the City Charter and codified ordinances for enactment of new zoning laws, that is without referral to the planning commission, hearing by the planning commission, and hearing by the City Council before enactment.

The District Judge erroneously stated, "...plaintiffs admit that the Charter authorizes emergency legislation in which the regular hearing[s are]...precluded...." A 77, 35a.

Plaintiffs have never made such admission knowingly. We are aware of no statement by the plaintiffs that would reasonably support a belief that they had.

However, the District Court did not rely solely on this mistaken belief as to the plaintiffs' admission. After quoting (A 78-9, 37a-38a) Article III, Sec. 11 of the Willoughby City Charter (which we reproduce at 11a-12a) the District Court opinion stated (a 80, 38a-39a)

"The Charter provision for emergency legislation must be read as a limitation on the procedures provided under the zoning ordinances and the proper use of the emergency legislation could not properly be considered to take away or remove any rights which plaintiffs may have had."

The fact is that no word of the provisions for emergency legislation either in the State statute (ORC 731.29-30, 7a-9a) or in the Charter provision (11a-12a) purports to have anything to say whatsoever about the procedure before an ordinance or other measure is enacted. The emergency provisions relate solely to the effective date after enactment, which, in order to allow for referendum, is ordinarily to be thirty days later, but may be immediately after enactment with emergency clause. There is no way in which the Charter provisions for emergency legislation can "be read as a limitation on the procedures provided under the zoning ordinances."

This is so plain that no such issue of State law was anticipated or could be reasonably anticipated when the complaint was drafted and filed in the District Court.

It is so plain that in all the briefs that have been filed and in all the oral argument that was made to the Court of Appeals by counsel for the respondents, no word was said in defense of the District Court's position on this point.

We have not been able to find a single Ohio case that holds that the enactment of a

measure by the emergency provisions can properly avoid any "of the red tape required" (A 79, 38a) to enact an ordinance or resolution before its passage.

Clearly the District Court "decided an important State...question in a way in conflict with applicable state...law". Rule 19, Sec. 1(b), Supreme Court Rules.

Why did not the Court of Appeals reverse the District Court's plain error in this respect? The Court of Appeals did not explain. It said simply, "the issues of State law raised by plaintiffs-appellants on this appeal are matters for determination in the State courts of Ohio."

But the Court of Appeals affirmed the judgment of the District Court that the plaintiffs-appellant had "failed to establish a violation of federal constitutional rights." And that decision by the District Judge was reached only through the erroneous conclusion part of which we have already quoted but which is so vital that we quote it again:

> "Third, plaintiffs have failed to show how a right existing under the zoning ordinances has been removed by defendants. The Charter provision for emergency legislation must be read as a limitation of the procedures provided under the zoning ordinances and the proper use of the emergency legislation could not properly be considered to take away or remove any rights which plaintiffs may have had." (A 78, 38a-39a.

The District Court's error as to the effect of the emergency feature of the council's resolution not only led to this conclusion that no right of the plaintiffs had been taken away, but seemingly this error and the District Court's erroneous belief that the plaintiffs admitted that the emergency procedures could do away the required hearings led the District Court to its erroneous insistence upon proof of either a discriminatory animus or of intent to avoid the hearing procedures.

Since the District Court's error as to State law was so far reaching in its effect, so fundamental to the District Court's decision, the Court of Appeals surely should have corrected it, instead of saying that it was a matter for determination in the state courts.

In failing to correct the error the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Supreme Court Rules, Rule 19, Sec. 1(b).

Question 2: Did the Courts Below Err In Holding that the Case Presented No Violation of Federal Constitutional Rights?

Petitioners would answer YES.

The deprivation of federal constitutional right that the plaintiffs claim consists of being deprived of opportunity for public hearings before the Planning Commission and City Council on the question of whether the proposed re-zoning should be adopted. Since the

hearings would have given them opportunity for speech and petition, the deprivation violated the First Amendment, through the Fourteenth. Since these liberties of speech and petition were taken from them by means that violated the Willoughby City Charter and Ordinances in enacting new zoning by resolution and consent decree instead of by ordinance and without the hearings required for an ordinance, the plaintiffs were deprived of liberty without due process of law, also in violation of the Fourteenth Amendment.

The District Court acknowledged that the complaint stated a cause of action under 42 U.S.C. Sec. 1983. A 74, 32a.

The District Court also made the following acknowledgement:

> "Furthermore, although the hearing and referendum rights in issue here are not specifically guaranteed by the United States Constitution, those rights, once created by local law, are protected by the United States Constitution from an arbitrary denial. Gomillion v. Lightfoot, 364 U.S. 399 (1960); Briscoe v. Kusper, 435 F.2d 1046, 1053 (7th Cir. 1970). (A 74, 32a).

But the District Court was misled by its error in believing that "the Charter authorizes emergency legislation in which the regular hearing[s are] precluded. And believing that plaintiffs admitted this, the Court concluded that the plaintiffs were compelled to show

> "that municipal officials purpose-

> fully delayed until emergency legislation was required and that they did so as a part of a conspiracy to deprive plaintiffs of a hearing and referendum." A 77, 35a.

The plaintiffs did indeed make those contentions, but the District Court's statement leaves out of consideration their alternative contention that even if the delay was not a purposeful part of a conspiracy to deprive plaintiffs of hearing and referendum, nevertheless the resolution and consent decree constitute express, explicit, written, and irrefutable joint action by the defendants (except John Tigue, Sr., the Building Commissioner) to accomplish the zoning opposed by the plaintiffs by means that in fact prevented plaintiffs from expressing their opposition through public hearings. Plaintiffs contend and contended below that the second alternative interpretation of the facts still entitled them to the relief they seek because under 42 U.S.C. Sec. 1983 it is not necessary to prove specific animus or intent to deprive them of their constitutional rights. Erroneously attributing to the emergency form of action the lawfulness of that deprivation the District Court erroneously concluded that the plaintiffs were not deprived of anything to which they had a right unless the defendants could be shown to have acted with purpose to injure the plaintiffs.

We assume that if indeed the Charter provisions for emergency legislation justified the omission of hearings before the Planning Commission and Council before enactment of a new zoning ordinance the violation of the rights of the plaintiffs in the absence of intent to injure them would be

far less plain. But since we believe that the Charter provisions for emergency legislation cannot be read to justify that omission, we believe there was a plain deprivation of rights as we have stated above.

In a civil case under 42 U.S.C. Sec. 1983 when local government officials acting in their governmental capacity and thus under color of local law deprive a person of constitutional rights it is not necessary to demonstrate specific animus or intent to accomplish that deprivation. Many statements of this Court make this clear, either directly or by implication. We quote some of them, in chronological order.

Buchanan v. Warley, 245 U.S. 60, 74, 62 L.Ed. 149, 160, 38 S.Ct. 16, 1917:

> "...the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this Court that we need not stop to cite the cases."

N.A.A.C.P. v. Alabama, 357, U.S. 449, 461, 2 L.Ed. 2d 1488, 1499, 78 S. Ct. 1163, 1958:

> "The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action... to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order....In the domain of these indispensable liberties, whether of speech, press, or

association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."

Cooper v. Aaron, 358 U.S. 1, 15, 3 L.Ed. 2d 5, 15, 78 S. Ct. 1401, 1958:

"One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position."

Monroe v. Pape, 365 U.S. 167, 187, 81 S. Ct. 473, 484, 5 L.Ed 2d 492, 505, 1961. Contrasting Sec. 1979, of the Revised Statutes, 42 U.S.C. Sec. 1983, with the criminal provision, 18 U.S.C. Sec. 242, dealt with in Screws v. United States, 325 U.S. 91, 89 L.Ed. 1495, 65 S. Ct. 1031, 162 ALR 1330, and United States v. Classic, 313 U.S. 299, 85 L.Ed. 1368, 61 S. Ct. 1031, the Court said:

"The word 'wilfully' does not appear in Section 1979. Moreover, Section 1979 provides a civil remedy, while in the Screws Case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

N.A.A.C.P. v. Button, 371 U.S. 415, 438-9, 9 L.Ed. 2d, 405, 421, 83 S. Ct. 328, 1963:

> "Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.... In N.A.A.C.P. v. Alabama,...we said, 'in the domain of these indispensable liberties, whether of speech, press, or association, the decisions of thie Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.'"

Watson v. Memphis, 373 U.S. 526, 537 10 L.Ed 2d 529, 538, 83 S. Ct. 1314, 1963:

> "...vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them."

Palmer v. Thompson, 403 U.S. 217, 226, 29 L.Ed. 2d 438, 445, 91 S. Ct. 1940, 1945, 1971:

> "Petitioners have argued strenuously that a city's possible motivations to insure safety and save money cannot validate an otherwise impermissible state action. This

proposition is, of course, true. Citizens may not be compelled to forego their constitutional rights because officials fear public hostility or desire to save money. Buchanan v. Warley ...Cooper v. Aaron,...Watson v. City of Memphis...."

Lower court cases that have applied even more explicitly the principle that it is not necessary under 42 U.S.C. Sec. 1983 to show specific animus or intent on the part of defendants are Hawkins v. Town of Shaw, Miss., 461 F.2d 1171, 5th Cir., 1972; Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 2d Cir., 1968; Whirl v. Kern, 407 F.2d 781, 5th Cir., 1969; Anderson v. Haas, 341 F.2d 497, 3rd Cir., 1965; Parker v. McKeithen, 488 F.2d 553, 5th Cir., 1974.

Under the facts in this case and the true state law (which the District Judge construed erroneously) it was erroneous to deny that the plaintiffs suffered any violation of federal constitutional right on the ground that there had been no showing of specific animus or intent on the part of the defendants to deny the plaintiffs their rights. The Court of Appeals therefore erred in affirming the District Court's judgment.

In so deciding the federal question both Courts acted in conflict with applicable decisions of this Court. Supreme Court Rules, Rule 19, Section 1(b).

Question 3: The State law ground on which, principally, the District Court held that there was no violation of federal constitutional right was that the provisions for emergency legislation excused the avoidance of public hearings otherwise required for enactment of a zoning ordinance; the court of appeals did not discuss this question, saying the state law questions were for the state courts, but nevertheless affirmed the district court's federal holding grounded largely on the district court's state law decision; did the court of appeals err in adopting the result while abstaining from its ground, without other adequare ground appearing?

Petitioners would answer YES.

We have already shown how grossly the district court erred in finding that the provisions for emergency legislation justified avoidance of the hearings before enactment of new zoning. And we have shown the language by which its opinion demonstrates that it was led by this error to demand of the plaintiffs a showing of specific animus or intent to violate the plaintiffs' rights on the part of the defendants, which was the basis of its adoption of this erroneous rule.

Thus both the state and federal grounds for the district court's conclusion that plaintiffs had demonstrated no deprivation of federal constitutional rights rested upon the district court's state law error.

It was under these circumstances that the court of appeals affirmed the district court's denial of violation of federal constitutional right and said that the state law question was for the state courts!

The court of appeals' action defies logic, renounces reason, deprives the plaintiffs of due process of law, and "so far depart[s] from the accepted and usual course of judicial proceedings...as to call for an exercise of this court's power of supervision." Supreme Court Rules, Rule 19, Sec. 1(b), the last clause.

Question 4: Did the Court of Appeals err in its application of the abstention doctrine in that it decided the federal constitutional question (affirming the district court) while abstaining from decision of the state law question which might dispose of the case without necessity for decision of the federal constitutional question?

Petitioners would answer YES.

The statement of the court of appeals that the state law questions were for the state courts, it seems to us, can be understood only as a determination to abstain from deciding them. Since the court of appeals did not identify what the questions were its decision in this respect may not be completely clear. Petitioners have identified the state law question that they regard as most important, in view of the district court's error in deciding

it and the consequences of that error. That, of course, is the district court's ruling that the provisions for emergency legislation gave the defendants authority to by-pass the prescribed procedure for enacting zoning legislation.

The district court identified a different question in saying, 32a,

> "The Court further notes that the state claim, that council had not enacted a comprehensive zoning plan as required by ordinance, is not so entwined with the federal claims that the court should take pendent jurisdiction of this claim."

In this statement the district court clearly misquoted the Willoughby City Charter, Article 4, Sec. 3, 13a. What the Charter actually says is

> "The Council shall by ordinance adopt a comprehensive general plan for the orderly development of the city and plans for the re-development of areas or districts therein...."

Thus enactment of a comprehensive zoning plan is not required by ordinances. Enactment of the plan is required by the City Charter. The word "ordinance" enters into the charter through the Charter's prescription that the plan be enacted by ordinance.

Thus the petitioners' state claim was not that the Council had not enacted a comprehensive zoning plan but that in adopting a plan for the redevelopment of the T.E.K. area the

Council had acted not by ordinance as required by the Charter but by resolution and consent decree.

Thus this element of the plaintiffs' state claim was one of the grounds for claiming that the enactment by resolution and consent decree instead of by ordinance with the required hearings was illegal and that therefore plaintiffs were deprived of their First Amendment rights of speech and petition without due process. This is a far cry from being "not so entwined with the federal claims that the court should take pendent jurisdiction...."

But at least the district court explained that it believed, though by misunderstanding apparently born of misquotation, that there was not a sufficient connection between the federal claim and that particular state claim to make the state claim truly pendent.

This the Court of Appeals failed to do. If this is what it thought was ground for its statement that the state law questions were for the state courts, then, as we have seen, it utterly failed to understand the relation between "the issues of State law raised by plaintiffs appellants on this appeal" and the claim of the plaintiffs appellant that their federal constitutional rights had been violated.

We believe that the Court of Appeals erred in failing to follow the teachings of Hagans v. Lavine, 415 U.S. 528, 39 L.Ed. 2d 577, 94 S. Ct. 1372, 1974.

It should first have determined, as the district court did, that there was a substantial federal claim, 415 U.S. at 537, bearing

in mind that federal claims are constitutionally insubstantial only if they are essentially fictitious, wholly insubstantial, obviously frivolous, obviously without merit, or inescapably frivolous under prior decisions. 415 U.S. at 537-538, quoting Goosby v. Osser, 409 U.S. 512, 518, 35 L.Ed.2d 36, 92 S. Ct. 854, 1973. And we observe that there need be no concern here as there was among the dissenters in Hagans for the thinness of the federal claim. There it was one of equal protection not involving a suspect classification, so that a rational basis would be sufficient to defeat it, and this seemed to the dissenters to be plainly present. Here the federal claim is first of all one under the First Amendment (through the Fourteenth). The First Amendment may not erect "a virtually insurmountable barrier" here as it does in behalf of "the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. Miami Herald Publishing Company v. Tornillo, 418 U.S. 241, 259, 41 L.Ed. 2d 730, 742, 94 S. Ct. 2831, 1974 (Mr. Justice White, concurring). But nevertheless "the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safe-guarded by the Bill of Rights....[L]aws which actually affect the exercise of these vital rightscannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with an evil. United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222, 19 L.Ed 2d 426, 430, 88 S. Ct. 353, 1967. Only a compelling state interest can justify limiting First amendment freedoms. N.A.A.C.P. v. Button, 371 U.S. 415, 438, 9 L.Ed. 2d 405, 421, 83 S. Ct. 328, 1963.

The Court of Appeals must have been satisfied that the federal claim was a substantial one because it did not direct the district court to dismiss for want of jurisdiction but affirmed its decision that there had been no deprivation of federal constitutional right, thus deciding the question on the merits, exercising jurisdiction, not declining it.

We see no doubt that the state claim is properly a pendent one, as pleaded in the complaint. The claim of pendent jurisdiction was intended to refer not only to the portion of the facts distortedly recognized by the district court, that is, the violation of the charter requirement that comprehensive zoning and re-zoning be done by ordinance, but also the fact that any re-zoning must be done by the procedures spelled out in the ordinances including the public hearings.

These facts fulfill the standards set forth in United Mine Workers v. Gibbs, 383 U.S. 715, 725, 16 L.Ed. 2d 218, 228, 86 S. Ct. 1130, 1966. That is, the state and federal claims do derive from a common nucleus of operative fact, and are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding, or else be barred by res judicata from proceeding further on the one not tried.

In fact, the state and federal claims here seem to fulfill what Gibbs characterized as the "unnecessarily grudging" standard of Hurn v. Oursler, 289 U.S. 238, 246, 77 L.Ed. 1148, 1154, 53 S. Ct. 586, 1933. The standard by which the state and federal claims were characterized in Hurn is that they "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances."

Both standards are clearly applicable here. The cause of action is violation of rights of the plaintiffs in depriving them of opportunities for public hearing in the course of legislative consideration of the rezoning. Whether that deprivation is regarded as a deprivation of federal constitutional rights to opportunities for effective speech and petition for redress of grievances created and established by state law and deprived in violation of the federal right of due process because in violation of state law, or whether the deprivation is regarded as a violation of the right of the plaintiffs as citizens and taxpayers of the City of Willoughby for the Charter and ordinances of the City of Willoughby to be obeyed by its public officials, the difference is purely epithetical.

The next inquiry under Gibbs, 383 U.S. at 726, and Hagans, 415 U.S. at 529, 546, is whether the exercise of the pendent jurisdiction will yield "advantages of economy and convenience and no unfairness to litigants." Hagans, 415 U.S. at 446.

Surely, in this case, it is more convenient for the plaintiffs' cause of action to be tried once rather than twice. The district court was clearly correct in accepting jurisdiction, though apparently without recognizing that it did so, of a portion of the pendent state claim, though it distortedly and erroneously declared that it was rejecting pendent jurisdiction with respect to another portion. Clearly the result of the district court decision, in the absence of direct review, would be to determine the entire cause of action, both federal and state, with the possible exception of the portion

declined, whatever it might be held to be in consideration of the district court's distorted description of it.

Once it is established that the state and federal claims arise from a common nucleous of operative fact and that considerations of economy, convenience, and fairness to litigants are satisfied, so that it is at least within the discretion of the federal court to take pendent jurisdiction of the state claim, it remains to be considered under Hagans, whether the federal courts must take jurisdiction because the state claim might be dispositive and thus avoid consideration of the federal constitutional question. 415 U.S. at 546. Here too, it appears that the Hagans standard is well met.

The relief that the plaintiffs sought was to stay the application of the new zoning created by the defendants' resolution and consent decree and to require the defendant councilmen to exercise their discretion to enact new and possibly valid zoning in the prescribed manner, that is, with the required referrals to the Planning Commission, the public hearings, and the right of referendum unless barred by exercise of the emergency power.

That relief could be granted perfectly well on the ground that the council and the mayor had violated the charter and ordinances of the City of Willoughby, and if granted on that ground there would be no need to consider whether or not the act of violating those requirements also constituted a deprivation of federal constitutional right. Thus under the teachings of Hagans and Gibbs it seems inescapable that the exercise of pendent jurisdiction to decide the state claims

was not only permitted, but mandatory. That should have been done by both the district court and the court of appeals before and possibly to the exclusion of consideration of the federal constitutional claim.

It may be asked why if all the relief they sought was available on the ground of violation of the Willoughby City Charter and ordinances, the plaintiffs chose to go into federal court in the first instance. In the district court it was argued by the defendants that the re-zoning was simply an exercise of their power and the power of the court of common pleas to settle the lawsuit pending there and that this gave validity to their action. Plaintiffs went to federal court in anticipation of this argument, rather than go to the same court of common pleas to assert their claim. Plaintiffs were not parties to the T.E.K. suit against the City of Willoughby in the common pleas court and could have affected that Court's consent decree only by intervention after it was entered, since they had no notice or knowledge that the case would be disposed of by that kind of decree. Either a motion for such intervention or a new and independent lawsuit in the Court that issued the decree, collaterally attacking it, would be a difficult and hazardous course, it was judged. The ultimate clincher against the claim that the parties and the court had power to settle the lawsuit in the way they did was the deprivation of federal constitutional rights that that form of settlement caused, and this plaintiffs preferred to present directly to the federal judiciary, as they clearly had a right to do.

It now becomes clear, we believe, that the Court of Appeals did err in its applica-

tion of the abstention doctrine. It should not have abstained from decision of the state law issues but should have embraced and decided them as pendent to the substantial federal claim, such decision giving advantages of economy and convenience and no unfairness to litigants, and providing a possible means of deciding the whole case without the necessity of resolving the federal constitutional issue. Instead, the Court of Appeals abstained from deciding the state law question and decided the federal constitutional question, a clearly erroneous reversal of the practice it should have adopted under the teachings of Hagans v. Lavine.

The Court of Appeals "decided a federal question in a way in conflict with applicable decisions of this Court." Supreme Court Rules, Rule 19, Sec. 1(b).

Question 5: Did the Court of Appeals err in that while it remitted the plaintiffs to the state courts for decision of the state law questions, yet by affirming the decision of the district court it left the case in such posture that in state courts the plaintiffs would have to overcome substantial claims of res judicata with respect to both the state law question and the federal constitutional question decided by the district court?

Petitioners would answer YES.

In saying that the state law questions were for the state courts the court of appeals

appears to have assumed and intended that the plaintiffs could sue again in state court to vindicate their claims of violation of state law. Yet the court of appeals affirmed the decision of the district court which was based, as we have seen, largely on the district court's erroneous decision of the state law, but without vacating or otherwise correcting the district court's state law ruling. Thus simultaneously the court of appeals said, in effect, "The state law questions are for the state courts", and "The district court's decision of the state law question is affirmed".

This leaves the case in an impossibly ambiguous position unless it is clarified by this Court.

If the plaintiffs should sue in state court with the case in its present posture, they obviously could make no federal claim since the federal claim has been expressly decided by both the district court and the Court of Appeals and would be held to be res judicata against them. If they should sue on their state claims, they would find that the central state claim has been decided by the district court against them and that the court of appeals has impliedly affirmed the district court decision of the state court question. Although simultaneously it said explicitly that the state court questions are for the state courts, yet it did not explicitly vacate the district court decision of the state law question to make that abstention effective.

Thus the defendants, to say the least, would have a substantial claim that not only

the federal question but also the state law question had been decided by the federal courts and was res judicata. If the court of appeals believes that the state court questions are for the state courts, it should at least leave the case in such posture that the plaintiffs can clearly go to state court for vindication of their state law rights.

In failing to do so the court of appeals "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this court's power of supervision." Supreme Court Rules, Rule 19, Sec. 1(b).

There is more. When it is appropriate to abstain, this is to allow a decision by state courts of an unsettled question of state law and thus avoid the possibility of unnecessarily deciding a constitutional question. Harris County Commissioners Court v. Moore, 420 U.S. 77, 43 L.Ed. 2d 32, 38-39, 95 S. Ct. 870, 1975.

Thus abstention involves some of the same questions as pendent jurisdiction. The choice between pendent jurisdiction and abstention seems to be determined by consideration of the questions of economy and convenience and no unfairness to litigants. Thus abstention is to be invoked where there is an action pending in the state court that would likely resolve the state law question underlying the federal claim, or when the state law questions are peculiarly within the province of the local courts, or where the issue turns on a state statute the meaning of which is unclear under state law, or where the state courts would be likely to construe the statute in a fashion that could avoid the need for a federal constitutional ruling or other-

wise signigicantly modify the federal claim, or where the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute. Harris County, 43 L.Ed. 2d at 39-40.

We do not believe any of these considerations applies to this case. The state law question, while perhaps unsettled in the sense that we have found no state decision that deals with it, nevertheless involves no uncertainty or ambiguity of the state law, the charter and ordinances being perfectly clear in providing for modification of procedure by reason of emergency only after enactment and only by avoiding the 30 day delay designed to allow referendum. Thus even at the beginning it would have seemed unlikely that resolution of that state law question would significantly affect the federal claim, except to avoid necessity of deciding it, as we have indicated above in discussing the pendent jurisdiction question. 43 L.Ed. 2d at 39. Moreover, by the time the Court of Appeals decided to abstain resolution of the litigation had already been long delayed; for this reason too abstention should have been rejected. 43 L. Ed. 2d at 39.

But for a federal court to abstain means to stay its hand and thus avoid the possibility of unnecessarily deciding a constitutional question. 43 L.Ed. 2d at 39. And this is precisely what the court of appeals did not do. It should either have decided the state law question or else if it determined to abstain it should have abstained from deciding the federal question as well.

The unfair consequences of what the court of appeals has done is abundantly evident here. If the Plaintiffs went to state

court with the case in its present posture they would not only have to overcome a substantial claim of res judicata with respect to the state question, as we have already indicated, but they would be clearly barred from presenting to the state courts the most important argument they would have if the state courts were inclined to sustain the power of the defendants and the Common Pleas Court to provide the new zoning by resolution and consent decree in order to settle the Common Pleas lawsuit. That strongest argument for the plaintiffs would be the federal claim, that is, that that manner of disposing of the common pleas case deprived the plaintiffs and other opponents of the new zoning of their rights to hearing and their conditional right to referendum created by state law and protected by the First and Fourteenth Amendments to the United States Constitution. For the federal claim would be clearly res judicata.

Again the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this court's power of supervision." Supreme Court Rules, Rule 19, Sec. 1(b).

CONCLUSION

The district court committed plain error in its reading of the Willoughby Charter and ordinances, in finding that they authorized re-zoning by emergency legislation without the prescribed public hearings. This error of state law led the district court to its error of federal law, saying that the plaintiff must prove specific animus or intent

on the part of the defendants to deprive the plaintiffs of their rights of public hearing.

The court of appeals did not adopt the district court's error of state law, but neither did it reverse it; rather it said that the state law questions were for the state courts. Yet it still failed to do what those words of abstention imply it should have done. That is, the court of appeals failed to direct the district court to vacate its state law ruling in favor of possible decision of the question by the state courts. Therefore if the plaintiffs went to state court with their state law claim, this ambiguity of the record would force them to face a substantial claim that the state law question is res judicata.

The court of appeals' abortive abstention as to the state law questions is undermined still further by the fact that the court of appeals affirmed the district court's decision of the federal question, denying that plaintiffs federal constitutional rights have been violated. This is illogical and anomalous because the district court was led to its federal law error by its state law error, and rested its federal law conclusion in part on that federal law error and in part on the state law error directly, all of which makes the state law error an integral part of the federal law decision that the court of appeals affirmed while saying the state law questions are for the state courts.

The court of appeals did not correctly apply the abstention doctrine. The case is not appropriate for abstention because there is no controlling state law question as to which there is room for any substantial doubt: no even colorable, let alone substantial,

claim can be made that the state law is what the district court held it is; not even the respondents have attempted to support the district court's ruling on that question.

Moreover, if there were sound grounds for abstention that whould have led the court of appeals to abstain and direct the district court to abstain from deciding the federal constitutional question as well, instead of affirming the district court's decision of it.

The correct course here would have been to treat and decide the state law question as one within the courts' pendent jurisdiction. Correct decision of the state question, we believe, would moot the federal constitutional question. But if in consideration of the power of the court of common pleas and the parties to its case to settle that litigation it was thought the charter and ordinance did not in themselves prevent the re-zoning by resolution and consent decree then the federal courts would have to ask whether the United States Constitution permits such a settlement, in view of the fact that the settlement deprives plaintiffs and others of their rights of speech and petition.

But the court of appeals did not correctly apply its pendent jurisdiction over the state law question, and failed to rule on it.

Certiorari should be granted, because of court of appeals decisions contrary to prior decisions of this court, and its departures from the accepted course of judicial proceedings that call for exercise of this court's power of supervision.

(i) OPINIONS BELOW

As we have indicated in (a), above, the opinions of the district court and the opinion of the court of appeals are appended hereto.

We have appended also the consent decree issue by the Court of Common Pleas, 25a-28a.

RALPH RUDD
Attorney for Petitioners

Of Counsel:

RUDD, KARL, SHEERER, LYBARGER
and CAMPBELL CO., L.P.A.
33 Public Square - Room 210
Cleveland, Ohio 44113
Telephone (216) 241-3646

CERTIFICATE OF SERVICE

Three copies of the petition for certiorari and its appendix have been served this 6th day of October, 1975 by United States Mail upon the attorney for each of the parties of record in the court below, that is,

Upon Louis A. Turi, Jr., 4169 River Street, Willoughby, Ohio 44094, phone 216, 951-2800, attorney for the defendants respondent Harold E. Brichford, John R. Englehart, Ralph Pettifer, John H. Hager, Cecil R. Lutz, Hugh D. Pallister, Donald M. Park, William G. Ryan, John Tigue, Sr., and the City of Willoughby;

Upon John G. Cardinal, 500 Lake County National Bank Building, Painesville, Ohio 44077, phones 216, 352-3375, and 216,942-7790, attorney for the defendant respondent T.E.K. and Associates;

And upon Nancy Buckley and Thomas D. Buckley, Jr., 132 Maple Street, Chagrin Falls, Ohio 44022, phone 216,247-7533, attorney and of counsel for the amicus curiae the American Civil Liberties Union of Greater Cleveland.

Ralph Rudd

RALPH RUDD

APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

AMENDMENT I
RELIGION, FREE SPEECH, ETC.

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV
RIGHTS OF CITIZENS

§1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE

§1331. Federal question; amount in controversy; costs (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest any costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.
As amended July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

As amended Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

TITLE 42
THE PUBLIC HEALTH AND WELFARE

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

§1985. Conspiracy to interfere with civil rights-
Preventing officer from performing duties

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway

or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
R.S. § 1980.

§1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Tital 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall

be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.
R.S. § 722.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE II: LEGISLATIVE

§1f [Power of municipalities.]

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law. (Adopted September 3, 1912.)

OHIO REVISED CODE

§731.29 [Referendum petition.]

Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code. No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village, except as provided by such section.

When a petition signed by ten percent of the number of electors who voted for governor at the next preceding general election for the office of governor in the municipal corporation, is filed with the city auditor or village clerk within thirty days after any ordin-

ance or other measure is filed with the mayor or passed by the legislative authority of a village or in case the mayor has vetoed the ordinance or any measure and returned it to council, such petition may be filed within thirty days after the council has passed the ordinance or measure over his veto, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such auditor or clerk shall, after ten days, and not later than four p.m. of the ninetieth day before the day of election, certify the text of the ordinance or measure to the board of elections. The auditor or clerk shall retain the petition. The board shall submit the ordinance or measure to such electors, for their approval or rejection, at the next succeeding general election, occurring subsequent to ninety days after the certifying of such petition to the board of elections.

No such ordinance or measure shall go into effect until approved by the majority of those voting upon it. Sections 731.28 to 731.41, inclusive, of the Revised Code, do not prevent a municipal corporation, after the passage of any ordinance or other measure from proceeding at once to give any notice or make any publication required by such ordinance or other measure.

*HISTORY: 126 v 205 (208), §1 (Eff 1-1-56); 129 v 324, §1. Eff 7-17-61.

§731.30 Application of sections.

Whenever the legislative authority of a municipal corporation is required to pass more than one ordinance or other measure to complete the legislation necessary to make and

pay for any public improvement, sections 731.28 to 731.41, inclusive, of the Revised Code shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto. Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof, and emergency ordinances or measures necessary for the immediate preservation of the public peace, health, or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive a two-thirds vote of all the members elected to the legislative authority, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure.

HISTORY: GC § 4227-3; 102 v 521, §3; 103 v 211 (212). Eff 10-1-53.

§733.56 Application for injunction.

The solicitor shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption.

HISTORY: 129 v. 1817 (1819), §1. Eff 11-8-61.

§733.59 Suit by taxpayer.

If the solicitor fails, upon the written request of any taxpayer of such municipal corporation, to make any application provided for in sections 733.56 to 733.58, inclusive, of the Revised Code, such taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no solicitor may bring such suit on behalf of such municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives secruity for the cost of the proceeding.

HISTORY: 129 v. 1817 (1819, §1. Eff 11-8-61.

§733.61 Duty of court.

If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney.

HISTORY: GC § 4316; RS § 1779; Bates § 1536-669; 66 v 175, § 161; 95 v 317. Eff 10-1-53.

[A 55]

C H A R T E R

O F

T H E C I T Y O F

W I L L O U G H B Y

ARTICLE III
The Council

Section 11. Effective Date of Ordinances and Resolutions. Each ordinance providing for the appropriation of money, or for an annual tax levy, or for improvements petitioned for by the owners of a majority of the foot frontage of the property benefited and to be specially assessed therefor, and any emergency ordinance or resolution necessary for the immediate preservation of the public peace, health or safety, shall take effect, unless a later time be specified therein, upon its signature by the Mayor, or upon the expiration of the time within which it may be disapproved by the Mayor, or upon its passage after disapproval by the Mayor, as the case may be. No other ordinance or resolution shall go into effect until thirty days after its final passage by the Council. Each emergency measure shall contain a statement of the necessity for such emergency action and shall require the affirmative votes of at least five members of the Council for its enactment. No

action of the Council in authorizing any change in the boundaries of the City, or the surrender or joint exercise of any of its powers, or in granting any franchise, or in contracting for the supply to the City or its inhabitants of the product or service of any utility, whether municipally owned or not, shall be taken as an emergency measure.

[A 56]

ARTICLE VI
Planning and Zoning

Section 1. Planning Commission; organization, terms of office; vacancies. There shall be a city planning commission which shall consist of five members, four of whom shall be appointed by the Mayor and confirmed by the Council, none of whom shall hold any other public office or position in the city. The fifth member shall be elected by the Council from its membership for his term as councilman. The commission shall elect its chairman from among the appointed members.

The term of the appointed members shall be four years, except that, of the four members first appointed, one shall be appointed for a term of one year, one for two years, one for three years and one for four years. Any appointed member of the commission may be removed for cause by the Mayor after a public hearing. Any vacancy during the unexpired term of an appointed member shall be filled by a new appointment for the remainder of the term.

Section 2. Planning Commission; powers and duties. The commission shall have the powers conferred upon it by general law and it shall adopt and recommend to the Council a comprehensive general plan for the physical development of the city, or the re-development of any area or district therein, which shall include the location of public ways, property, bridges, schools, utilities, buildings, parks, playgrounds, and recreation areas, and the reservation and acquisition of lands therefor. It shall prepare and recommend to Council ordinances creating areas, zones and districts of permitted and excluded uses, including rules, regulations, restrictions and limitations governing the plan, design, height, floor area, number of stor-[A 57]ies, size of structures, area and size of lots, percentage of land occupancy, size of yards, courts, open spaces, locations, use and occupancy of public and private buildings, structures and land for trade, industry, off-street parking, residence, park, playground, agriculture, and all other uses or purposes, both public and private, pertaining to each, as will promote the general welfare of the city and its inhabitants. It shall have control over the platting and subdivision of lands and the improvement or development thereof. It shall annually make recommendations to the Mayor of the necessary or desirable capital improvements.

Section 3. General Plan and Zoning Ordinances. The Council shall by ordinances adopt a comprehensive general plan for the orderly development of the city and plans for the re-development of areas or districts therein, provided, however, that a part or parts thereof may be adopted or amended from time to time, by creating areas, zones, and districts of permitted and excluded uses of such numbers or classifications, and rules,

regulations, limitations and restrictions pertaining to each as will promote the general welfare of the city and its inhabitants. It shall have full legislative authority to accomplish those matters over which the planning and zoning commission is given power of recommendation, provided, however, any such matter shall be first submitted to the planning and zoning commission, and no action of Council shall be taken overruling the action of said commission except by a vote of two-thirds of the members of Council.

Section 4. Board of Zoning Appeals. There shall be a board of zoning appeals composed of five (5) members, none of whom shall hold any other public office or position in the city. All such members shall be appointed by the Mayor, with the concurrence of a majority of the members of Council for a term of four years, except that of the five (5) members first appointed after December 31, 1967, two shall be appointed for a term of one (1) year, one for two (2) years, one for three (3) years and one for four(4) years. The Mayor may remove any member for cause after pub-[A 58]lic hearing, and any vacancy shall be filled in the same manner as an original appointment but only for the remainder of the unexpired term.

It shall be the duty of the Board of Zoning Appeals to hear and determine appeals made for exceptions to and variations in the application of the provisions of zoning ordinances in harmony with the intent and purposes thereof, and from any ordinance, regulation, rule, restriction or limitation, or order of any administrative official or agency in connection therewith.

Section 5. Construction. This article and all ordinances, rules, and regulations shall be liberally construed to give effect to the beneficial distribution of population, and the orderly development, improvement and general welfare of the city.

Section 6. Appropriations. Council shall appropriate annually adequate sums to give effect to the purpose of this article.

ARTICLE IX

Initiative, Referendum and Recall

Section 1. Initiative and Referendum. Ordinances and other measures may be proposed by initiative petition and adopted by election, and ordinances and other measures adopted by the Council shall be subject to referendum, to the extent and in the manner now or hereafter provided by the Constitution or the Laws of Ohio.

CODIFIED ORDINANCES OF WILLOUGHBY

PART ELEVEN - PLANNING AND ZONING CODE

CHAPTER 1133
Amendments

1133.01 CONDITIONS FOR AMENDING.

This Zoning Code and Zone Map may be amended periodically in order to keep it abreast of new zoning techniques, as well as when the following general conditions arise:

(a) Whenever a general hardship prevails throughout a given district;

(b) Whenever a change occurs in land use, transportation or other sociological trends, either within or surrounding the community; and

(c) Whenever extensive developments are proposed that do not comply but would be in the public interest.

Such amendments shall be made in accordance with the legislative procedures set in this chapter. (Ord. 1962-66. Passed 11-26-62)

1133.02 INITIATION OF AMENDMENTS.

A proposed amendment to the zoning text or Zone Map may be initiated by the Planning Commission, Council or anyone having an interest in affected real estate. If initiated by Council, it shall be referred to the Commission. If initiated at the request of the owner of the property involved or any other person having an

interest in the premises affected, the proposed change shall be in the form of a petition to the Commission, accompanied by a plan drawn to scale and the last known name and address of the owners of all property within 300 feet of the area proposed to be changed, as shown upon the records of Lake County. Where the property within 300 feet is under the ownership as the property proposed to be changed, the names and addresses of the owners of all property adjoining that within which the area proposed to be changed is situated, shall also be furnished with the petition. Text changes requested need no map or list of owners. (Ord. 1967-4. Passed 9-11-67.)

[A 60]

1133.03 ACTION BY PLANNING COMMISSION; PUBLIC HEARING.

The Planning Commission shall be allowed not more than forty-five days after the first regular meeting following the receipt of the proposed amendment to consider the proposal, unless extended by Council for an additional period of time. No extensions beyond an additional forty-five days shall be allowed by the Commission without the written consent of the applicant. In the event the Commission fails to either approve or reject the petition within the forty-five day period or at the end of any extended period of time, then the same shall be deemed to have been rejected. The Secretary or Presiding Officer of the Commission shall forthwith transmit to the Clerk of Council either the recommendation of the Commission, be it an approval or a rejection of the petition, or the fact that the Commission has neither approved nor rejected such petition within such forty-five day period. In the event that during such forty-five day period, the Commission elects to make a re-

commendation to Council which may consist of a partial approval of the petition, or an alternative recommendation, the same shall in like manner be transmitted to Council. In the event the proposed amendment is to effect a change in the Zone Map, then the Commission shall hold a public hearing thereon, which hearing shall be held within such forty-five day period, and at least ten days prior to such hearing, the Commission shall send written notice to all owners of property required to be notified under Section 1133.04, such notice to be delivered to the same persons and in the same manner as is outlined in such Section 1133.04. The Commission shall further cause publication of notice of such hearing to be made once in a newspaper of general circulation at least ten days prior to the date of the hearing; publication shall also be required ten days prior to the meeting at which the Commission takes action on any proposed text amendment.
(Ord. 1967-4. Passed 9-11-67.)

1133.04 ACTION BY COUNCIL; PUBLIC HEARING.

After receiving recommendations on a proposed amendations on a proposed amendment from the Planning Commission,or after the forty-five day no decision period of the Commission, Council shall advertise and hold a public hearing thereon. For all proposed text or map amendments, a notice shall be given in a newspaper of general circulation in the City at least fifteen days prior to the date of the hearing.

Where the proposed amendment is to effect a change in the Zone Map, a written notice of the hearing shall be mailed by the Clerk of Council, by first-class mail, at least five days prior to the date of the hearing, to the owners of all property within 300 feet of the area proposed to be changed, as defined in Section 1133.03, using for this purpose the last known name and address of such owners as shown upon the records of Lake

County or the list of property owners to be furnished by the petitioner under Section 1133-.02. The failure of delivery of such notice shall not invalidate any such amendment.

The published and mailed notification shall set forth the time and place of the public hearing and a summary of the proposed amendment. During the fifteen day advertising period, the text or copy of the text of such ordinance or amendment, and the maps, plans and reports submitted by the Commission shall be on file, for public examination, in the office of the Clerk of Council. After the public hearing, Council may adopt the proposal in the form of an ordinance amending this Zoning Code, and if the ordinance of Council adopts the recommendation of the Commission, the same may be done by a vote of the majority of the members of the entire Council. If Council elects to adopt an ordinance which modifies the recommendation of the Commission, or if Council elects to adopt an amendment to the Zoning Code which has been rejected by the Commission, the same may only be done by the affirmative vote of two-thirds of the entire membership of Council. In the event the petition of a property owner or other [A 61] interested person presented to Council is not voted upon in the form of an ordinance proposing to amend the Zoning Code, within sixty days following the public hearing, then the same shall be deemed to have been rejected by Council. The Clerk of Council shall submit a copy of any action affecting this Zoning Code to the Commission.
(Ord. 1967-4. Passed 9-11-67.)

1133.05 CURRENT RECORD

The Building and Zoning Inspector shall maintain a permanent and current record and copies of the Zoning Code and Zone Map showing all amendments thereto, which shall be maintain-

ed by the City Engineer.
(Ord. 1962-66. Passed 11-26-62.)

[A 62] Joint Exhibit 4

BILL NO. 1973-227

A resolution authorizing and directing the Director of Law to enter into a Consent Decree with respect to T.E.K. and Associates vs. The City of Willoughby, Ohio, Case No. 73-CIV-0260

WHEREAS, The Director of Law has recommended a Consent Decree with respect to the issues tried August 20 and August 21, 1973 in the case of T.E.K. and Associates vs. The City of Willoughby, Ohio, and

WHEREAS, Council feels that it would be in the paramount best interest of all the people of the City of Willoughby if said Consent Decree were entered into in that the Consent Decree would guarantee to the City restricted condonimium residential development on the subject property together with a limited amount of service commercial development together with a guaranteed period of time for the preservation of the Golf Course on said property, and

WHEREAS, an adverse decision in the above captioned suit would strip the City of any control

over the use of the subject property and would work to the detriment of the City and its residents:

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF WILLOUGHBY, OHIO: TWO-THIRDS OF THE MEMBERS THEREOF CONCURRING:

SECTION 1. That the Director of Law be and he hereby is authorized and directed to cause the Court of Common Pleas of Lake County to enter a Consent Decree and Judgment terminating and controlling the issues in the case of T.E.K. and Associates vs. The City of Willoughby, Ohio, Lake County Common Pleas Court Case No. 73-CIV-0260, all in accordance with the proposed Judgment attached hereto, marked Exhibit "A" and make a part hereof as though fully rewritten hereon.

SECTION 2. That this resolution is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and welfare of the inhabitants of the community and for [A 63] the further reason that the termination of the subject litigation will prevent great harm and damage to the City's authority over land use, wherefore, this resolution shall take effect and be in full force immediately upon its adoption and approval by the Mayor.

Adopted: August 21, 1973 /s/ John Englehart
Vice-Pres. of Council

Attest: /s/ Helyn A. Morse
Clerk of Council

Date: August 22, 1973 Approved: /s/ Harold E. Brichford
Mayor

Submitted to Mayor for his approval or disapproval this 22 day of August, 1973.

/s/ Helyn A. Morse
Clerk of Council

[A 64] Joint Exhibit 6

MINUTES OF SPECIAL MEETING OF COUNCIL
August 21, 1973

Meeting called to order at 7:45 by Vice-President John Englehart.

Note was made that notice of the special meeting was duly served by Patrolman Eisele.

ROLL CALL:

Councilmen Present: Lutz, Pallister, Pettifer, Ryan, Englehart, Hager.

Councilman Absent: Park

Motion made by Mr. Ryan and seconded by Mr. Pallister that Mr. Park be excused from the meeting.

ROLL CALL: Ayes: Lutz, Pallister, Pettifer, Ryan, Englehart, Hager.
Nays: None

Motion to excuse Mr. Park carried at 6 to 0

ALSO PRESENT: Mayor Brichford, Law Director Turi, Finance Director Morse, John Tigue, Jr.,

Visitors: Thomas E. Klunk, Dave Slyman, David Freed, Robert Riggin.

BUSINESS:

Motion made by Mr. Ryan and seconded by Mr. Pallister that legislation be read by caption only.

ROLL CALL: Ayes: Lutz, Pallister, Pettifer, Ryan, Englehart, Hager
Nays: None

Motion to read legislation by caption only carried 6 to 0.

BILL NO. 1973-227

A resolution authorizing and directing the Director of Law to enter into a Consent Decree with respect to T.E.K. and Associates vs. The City of Willoughby, Ohio Case No. 73-CIV-0260.

Mr. Louis A. Turi, Jr., gave a brief report on the court case and said that it was his recommendation that Bill No. 1973-227 be passed providing T.E.K. would release the city and all officials from any damages.

Mr. Freed said that a release will be delivered to the city.

Motion made by Mr. Hager and seconded by Mr. Pallister that the rules of council requiring three readings be suspended and that Bill No. 1973-227 be declared an emergency measure.

ROLL CALL: Ayes: Lutz, Pallister, Pettifer, Ryan, Englehart, Hager
Nays: None

[A 65]
Motion to suspend rules and declare Bill No. 1973-227 an emergency measure carried 6 to 0.

Motion made by Mr. Hager and seconded by Mr. Ryan that Bill No. 1973-227 be passed.

ROLL CALL: Ayes: Lutz, Pallister, Pettifer, Ryan, Englehart, Hager.
Nays: None

Motion to pass Bill No. 1973-227 carried 6 to 0.

BILL NO. 1973-228

An ordinance repealing Bill No. 1973-226.

Motion made by Mr. Ryan and seconded by Mr. Hager that Bill No. 1973-228 be passed.

ROLL CALL: Ayes: Lutz, Pallister, Pettifer, Ryan, Englehart, Hager.

Nays: None

Motion to pass Bill No. 1973-228 carried 6 to 0.

Meeting adjourned.

John L.Englehart, Vice-Pres.

Harold E. Brichford, Mayor

Helyn A. Morse, Clerk

[A 66] Joint Exhibit 7

Signed and Filed 8/22/73

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

T.E.K. & ASSOCIATES,	:	
	:	
Plaintiff	:	Case #73-CIV-0260
	:	
vs.	:	
	:	
	:	
THE CITY OF WILLOUGHBY,	:	
	:	
Defendant	:	JUDGMENT

The within cause came on to be heard and was duly heard upon the pleadings, the evidence received on August 20 and August 21, 1973, and this agreement of the parties hereto.

Prior to the Court making a decision in the case, the parties indicated to the Court that they had entered into an agreement for settlement and orally moved the Court to enter judgment in this case upon the terms and conditions of said agreement.

The Court finds said oral motion well taken and grants same.

The Court finds that the comprehensive zoning code of the defendant as it relates to certain real estate owned by plaintiff and described fully in the Complaint denies to plaintiff the reasonable use of this land for the reason that the premises are unsuitable for development and use

under the Suburban-5 (S-5) zoning classification.

The Court further finds that the restrictions on the use of this land to Suburban-5 (S-5) zoning classification under the present comprehensive zoning ordinance of defendant is unreasonable, arbitrary, discriminating and confiscatory and said restricted use has no relationship to the public health, safety and general welfare of the City of Willoughby and as such is unconstitutional in that it is a denial of due process of law and an attempt to take property under the power of eminent domain without just compensation, contrary to the provisions of Article I, Section 19 of the Ohio Constitution and Fifth and Fourteenth Amendments of the Constitution of the United States.

It is, therefore, determined and declared that the comprehensive zoning code of the City of Willoughby as it related to lands owned by plaintiff and fully described in the Complaint, is void and unenforceable and all officials, agents and employees be and they hereby are enjoined from enforcing or attempting to enforce the zoning ordinances of the City as it relates to the use of plaintiff's land.

Further, and in the exercise of the equitable powers of the Court, the Court adopts as its continuing order hereunder the agreement of the parties as hereinafter set forth:

1. That the land described in the Complaint shall henceforth be restricted in use to Service-Commercial (S-C) as defined in the City of Willoughby zoning code for twenty-one (21) acres of said land lying in the northwest corner of said land and specifically set out in a certain survey map which was plaintiff's Exhibit 17 in the within case; approximately 100 acres of said land presently being utilized for golf course and accessory uses to be restricted in use to Suburban (S-5) uses as defined in the City of Willoughby zoning code but specifically including the operation of a commercial golf course with accessory uses; and, the balance of said land consisting of approximately 87

acres to be restricted in use to those uses permitted under the Residential-Multi-Family (R-M-F) zoning classification as defined in the City of Willoughby zoning code, and made the subject of a declaration of condonimium restrictions under Chapter 5311 of the Revised Code of Ohio.

2. That until August 31, 1993, the portion of the premises presently devoted to use as a golf course, and consisting of approximately 100 acres, shall remain as a commercial golf course and used for said purpose only.

3. That, if at any time up to or after the date referred to in Paragraph 2 above, should T.E.K. elect or be required to sell, transfer or otherwise convey the portion of the premises described which is to remain as a golf course, then the City shall have the "first right of refusal" or right to purchase said premises.

4. That at no time shall T.E.K. use any portion of the premises for center-hall apartment type multi-family development or seek to have such use permitted on said premises.

5. That all construction and all dwellings or any other structures shall, at all times, conform with the applicable building code of the City of Willoughby.

6. That no construction other than the fence referred to below, shall be placed nearer than 50 feet north of the northerly property lines or property facing on the north side of Courtland Drive.

7. That T.E.K. shall within ninety (90) days from the time of commencement of development in the southerly portion of the development construct and install a chain-link fence separating the property of T.E.K. from the properties facing on the northerly side of Courtland Drive.

[A 69] 8. The maximum density of the premises being used in accordance with the commitments contained herein shall not exceed Eight Hundred Thirty-four (834) dwelling units as was proposed in plaintiff's 1972 application for rezoning.

The Court finds said agreement between the

parties for settlement of the within lawsuit to be fair, just and equitable and orders said agreement hereinabove set out into execution as a lawful judgment of this Court.

Costs in the within action are to be equally borne by the parties.

IT IS ORDERED.

/s/ John F. Clair
Judge

Approved:

/s/ David P. Freed
David P. Freed
Attorney for Plaintiff

/s/ Louis A. Turi, Jr.
Louis A. Turi, Jr.
Attorney for Defendant

[A 72] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed Nov. 21, 1973

MEMORANDUM OPINION
AND
ORDER

LAMBROS, DISTRICT JUDGE

In this suit plaintiffs sought declaratory and injunctive relief against the City of Willoughby, several municipal officials, and a private developer on the grounds that defendants conspired to and did adopt zoning provisions in a manner which violated plaintiffs' constitutional rights. On October 24, 1973, following a trial and the submission of briefs, the Court ruled that plaintiffs had failed to establish a violation of constitutional rights and entered judgment in favor of defendants. In that order the Court indicated that the findings of fact and conclusions of law, which are included herein, would follow.

Upon motion of plaintiffs and good cause shown, the plaintiffs' motion to vacate the judgment on October 24, 1973, and to re-issue the judgment simultaneously with the findings of fact and conclusions of law is hereby granted and the Clerk is ordered to re-issue the judgment accordingly.

I. MOTION TO DISMISS

Due to the necessity of an early trial in this case, the Court deferred ruling on the motion to dismiss the complaint and presents its rulings on the motion herein.

[A 73]

Plaintiffs seek to bring this suit under 42 U.S.C. §§1985(3), 1988, and 1983, on the grounds that defendants have acted jointly to deny their rights to vote. due process, and to petition for redress of grievances. They claim that the rights in question were created under the Charter and Ordinances of the City of Willoughby and are guaranteed against arbitrary denial by the United States Constitution. The Court concludes that the suit is properly brought only under 42 U.S.C. §1983.

Under 42 U.S.C. §1985(3), a suit may not be maintained for an denial of constitutional rights unless there is also a class-based, invidiously discriminatory animus behind the conspirators' actions to deny plaintiffs of certain rights. Griffin v. Breckenridge, 403 U.S. 88, 101-102 (1971); O'Neill v. Grayson County War Memorial Hospital, ___ F.2d___ (6th Cir. 1973); Denman v. Leedy, ___ F.2d___ (6th Cir. 1973). Since the Complaint in this case is berift of any such allegation and since there has been no proof of such animus, the suit may not be maintained under §1985(3).

Plaintiffs claim that §1988 provides a basis for taking pendent jurisdiction of any

state claims which plaintiffs may have against defendants. The statute provides as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offense against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

[A 74]
The reasonable import of the language is not, as plaintiffs urge, to enlarge the jurisdiction of the Court over state claims and, in fact, other courts have ruled that it does not enlarge federal jurisdiction. Pierre v. Jordan, 333 F.2d 351 (9th Cir. 1964) cert. den. 379 U.S. 974, reh. den. 380 U.S. 927 (1965), Otto v. Sommers, 332 F.2d 697, 699 (6th Cir. 1964), cert. den. 379 U.S. 1002,

reh. den. 380 U.S. 938 (1965). Therefore, the Court rules that §1988 does not provide a basis for this suit. The Court further notes that the state claim, that council had not enacted a comprehensive zoning plan as required by ordinance, is not so entwined with the federal claims that the Court should take pendent jurisdiction of this claim.

With respect to §1983, the complaint does state a cause of action. The allegations of joint activity and conspiracy between the private developer and municipal officials are sufficient to meet the state action requirements of §1983. Palmer v. Columbia Gas of Ohio ___ F.2d___ (6th Cir. 1973). Furthermore, although the hearing and referendum rights in issue here are not specifically guaranteed by the United States Constitution, those rights, once created by local law, are protected by the United States Constitution from an arbitrary denial. Gomillion v. Lightfoot, 364 U.S. 399 (1960); Briscoe v. Kusper 435 F.2d 1046, 1053 (7th Cir. 1970).

Defendants have raised a question of whether the City of Willoughby must be dismissed from the suit since a municipal corporation is not a "person" as that word is used in §1983. City of Kenosha v. Bruno ___ U.S.___, 37 L.Ed. 2d 109 (1973). Plaintiffs argue, however, that the Court may take jurisdiction under the general federal question statute, 28 U.S.C. §1331, since the amount in question exceeds $10,000. The Court notes that this question was specifically reserved by the Supreme Court in City of Kenosha, 37 L.Ed. 2d at 117. [A 75] See also Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 398 (1971). Since it is unnecessary for the Court to reach this question in light of the judgment in

favor of defendants and since it presents significant legal questions that have not been fully briefed, the Court will express no opinion as to the validity of plaintiffs' argument.

Having ruled that plaintiffs' complaint states a claim upon which relief may be granted under §1983, the remaining question is whether the plaintiffs have shown that defendants violated their constitutional rights through the intentional or arbitrary denial of the rights to vote, due process and to petition for redress of grievances.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The general legal standards applicable to this case are clear. First, the local officials must not exercise their authority to provide for the opportunity to vote or obtain redress of grievances arbitrarily or in such a way as to unlawfully discriminate against particular groups. Bullock v. Carter, 405 U.S. 134, 141 (1972); Weisberg v. Powell, 417 F.2d 388, 392 (7th Cir. 1969). Second, where the local officials restrict the right to vote or to obtain redress of grievances, they must do so in a manner which is reasonably necessary to accomplish legitimate state objectives. Bullock, supra at 144; Railroad Trainman v. Virginia Bar, 377 U.S. 1, 6-8 (1964). Third, where an existing right is removed, the removal must comply with the requirements of procedural due process. Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548 (1972).

In this case, however, plaintiffs have failed to show that their constitutional rights have been violated.

[A 76] Most of the events which form a basis for the findings of fact were stipulated by the parties. They represent a series of efforts by a private developer, defendant T.E.K. & Associates ("T.E.K."), to obtain zoning which would permit service commercial and multi-family residential development of land within the City of Willoughby and a series of attempts by plaintiffs, local residents opposing the development, to oppose the rezoning.

Prior to September, 1972, the land in question was zoned to permit only single-family dwellings of not less than five acres each. (The "S-5" zoning.) On September 20, 1972, the Mayor signed Ordinance 1972-109, which purported to re-zone the land in question to permit commercial and multi-family development. Plaintiffs thereafter filed a petition for a referendum on Ordinance 1972-109. However, the Finance Director refused to certify the petition to the Board of Elections.

Subsequently plaintiffs filed suit in the Common Pleas Court of Lake County, claiming that Ordinance 1972-109 was invalid and further that the petition for the referendum should have been certified. The Court on April 25, 1973, rules that Ordinance 1972-109 was void. The Court did not reach the question of the referendum petition.

On May 14, 1973, T.E.K. filed suit against municipal officials in the Common Pleas Court of Lake County seeking a declaration that the original zoning, S-5, was invalid. That lawsuit was settled on August

22, 1973, with a consent judgment which declared S-5 to be void and which adopted new zoning provisions which would permit commercial and multi-family development. Since the events leading up to the consent judgment are crucial, they will be examined in more detail.

[A 77] The suit of T.E.K. was set for trial on August 20, 1973. On August 21, 1973, the City Council held a special meeting. The Council members had been advised by their Law Director that there was a likelihood that the Court would declareS-5 to be invalid. The Law Director further recommended that Council authorize a consent judgment through emergency legislation. Council at that meeting enacted Bill No. 1973-327, a resolution authorizing and directing the Law Director to enter into a consent decree with respect to the suit and declared the resolution to be an emergency measure.

Although plaintiffs admit that the Charter authorizes emergency legislation in which the regular hearing and right to a referendum are precluded and admit that the technical Charter requirements for emergency legislation were met in this case, they argue that municipal officials purposefully delayed until emergency legislation was required and that they did so as a part of a conspiracy to deprive plaintiffs of the hearing and referendum.

Concededly, had Council realized that the suit filed by T.E.K. would be successful within a month of the day it was filed and had Council devoted immediate attention to the problem, it would have been able to pass new zoning prior to the trial in the regular manner and would have been able to schedule

public hearings on the measures. Plaintiffs have shown that on two occasions in 1968, Council enacted similar legislation within two-month periods.

However, since plaintiffs have the burden of proof, the Court must examine whether they have merely shown that Council was not working up to optimal efficiency or whether they have also shown that Council was in a conspiracy to deny plaintiffs of their constitutional rights by adopting the zoning through emergency rather than regular legislation. The first date on which plaintiffs have shown that Council was aware that the lawsuit posed a threat was August 14, 1973, [A 78] which was one week before the trial date, at which time Council attempted to rezone the property in question through Charter amendment. (This legislation was repealed on August 21, 1973.) By August, the alternatives facing Council in light of the likelihood of success in the T.E.K. suit and the minimal time period for passing regular legislation were to pass emergency legislation permitting a consent judgment implementing new zoning or to face a loss at trial which would leave the property in question without any zoning restrictions. The Court concluded that by the time the legislators were shown to be aware that the T.E.K. suit would be successful, the period had passed during which regular legislation to rezone could be passed, and the legislators were passing the emergency legislation in a bonafide attempt to obviate the problems which would arise if the land were left unzoned.

On the basis of these facts plaintiffs have not shown that any of the three principles discussed above have been violated by defendants. First, plaintiffs have not shown

that defendants, in using emergency legislation to authorize the consent judgment, did so with either a discriminatory animus or with intent to avoid the hearing and referendum procedures which would normally be present with regular zoning legislation.

The second inquiry is whether the provision for emergency legislation itself restricts the rights to a hearing and referendum in a manner not reasonably necessary to accomplish legitimate state objectives. The Chapter provision for emergency legislation applies only in limited circumstances. Article III, Section 11 of the Charter of the City of Willoughby, Ohio, provides as follows:

> Effective Date of Ordinances and Resolutions. Each ordinance providing for the appropriation of money, or for an annual tax levy, or for improvements petitioned for by the owners of a [A 79] majority of the foot frontage of the property benefited and to be specially assessed therefor, and any emergency ordinance or resolution necessary for the immediate preservation of the public peace, health or safety, shall take effect, unless a later time be specified therein, upon its signature by the Mayor, or upon the expiration of the time within which it may be disapproved by the Mayor, or upon its passage after disapproval by the Mayor, as the case may be. No other ordinance or resolution shall go into effect until thirty days after its final passage by the Council. Each emergency measure shall contain a statement of the necessity for such

> emergency action and shall require the affirmative votes of at least five members of the Council for its enactment. No action of the Council in authorizing any change in the boundaries of the City, or the surrender or joint exercise of any of its powers, or in granting any franchise, or in contracting for the supply to the City or its inhabitants of the product or service of any utility, whether municipally owned or not, shall be taken as an emergency measure.

Emergency legislation may be passed only with a statement of the necessity, with the affirmative vote of at least five members, and with respect to certain kinds of legislation. Without provision for such emergency legislation, the City could easily be placed in the predicament that they are unable to act quickly enough to serve the City's interests because of the red tape required. In this case, for example, without provision for emergency legislation, the Council might well have been faced with a situation in which the property in question was rezoned and in which there would be no control on the development thereon. The Court therefore concludes that the provision for emergency legislation is reasonably necessary to accomplish legitimate objectives of providing for exigencies which were not foreseen and that it is narrowly drawn enough to protect the rights of citizens against unreasonable denial.

[A 80] Third, plaintiffs have failed to show how a right existing under the zoning ordinances has been removed by defendants. The Charter provision for emergency legislation must be read as a limitation on the pro-

cedures provided under the zoning ordinances and the proper use of the emergency legislation could not properly be considered to take away or remove any rights which plaintiffs may have had.

For these reasons, the Court rules that the plaintiffs have not shown a denial of federal constitutional rights. Accordingly, judgment is entered in favor of defendants.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United States District Judge

Dated: November 20, 1973

[A 90] Entered on Docket 6/24/74

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

O R D E R

LAMBROS, DISTRICT JUDGE

On November 21, 1973, this Court entered judgment in favor of defendants, issuing a Memorandum Opinion explaining its decision. On December 4, 1973, plaintiffs moved for reconsideration, raising several issues they felt were incorrectly decided. The Court has given extensive consideration to all the arguments by plaintiffs, but the Court finds no basis for a revision of its previous opinion.

In clarification of that earlier opinion, however, the Court will expand its statement regarding the point in time at which the Willoughby City Council became aware of the threat presented by the lawsuit challenging its zoning of the T.E.K. land. The stipulated facts indicate the Councilmen's belief in the unconstitutionality of the challenged zoning in May, but it was not until August 14, 1974 that the impact on the City of such a holding would have was fully understood by Council. This was not as a result of negligence or intentional delay. And at that point, Council was faced with a need to act immediately to protect the City's interest. [A 91] Emergency

legislation provisions were designed to meet these exigent circumstances and the utilization of them by Council was proper in this situation and did not deny plaintiffs due process of law.

Therefore, plaintiffs' request for revision of the previous opinion of this Court, entered November 21, 1974, is denied.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

Dated: 6/24/74

UNPUBLISHED

No. 74-2270

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Decided and filed June 6, 1975

Before PHILLIPS, Chief Judge, and CELEBREZZE and ENGEL, Circuit Judges.

PER CURIAM. Plaintiffs-appellants, who are citizens and taxpayers of the City of Willoughby, Ohio, assert that their constitutional rights were violated when the Willoughby City Council utilized emergency provisions of the City charter to rezone a tract of land consisting of approximately 120 acres. Jurisdiction is asserted under 42 U.S.C. §§ 1983, 1985 and 1988 and 28 U.S.C. §§ 1331, 1343(3), 1343(4), and 2201.

After an evidentiary hearing, District Judge Thomas D. Lambros held that plaintiffs-appellants have not established a denial of federal constitutional rights. We affirm.

[2]

A developer, T.E.K. and Associates, purchased the tract of land in question at a time when it was zoned S-5, allowing only single family dwellings on lots containing not less than five acres. On September 20, 1972, Ordinance 1972-109 was passed by the City Council, re-zoning the land in question to permit commercial and multi-family development. Plaintiffs-appellants thereafter filed a petition for a referendum on the ordinance. The Finance Director refused to certify the petition to the Board of Elections.

Subsequently, plaintiffs-appellants filed an action in the Common Pleas Court of Lake County, Ohio, challenging the validity of Ordinance 1972-109 and further contending that the referendum petition should have been certified. The State trial court ruled on April 25, 1973, that the ordinance was invalid. The S-5 zoning was not reinstated. The court did not reach the issue of the referendum petition.

On May 14, 1973, T.E.K. filed suit against city officials in the Common Pleas Court of Lake County, seeking a declaration that the original zoning, S-5, was invalid. During the trial of that suit, the Willoughby law director became [3] convinced that S-5 zoning as it applied to T.E.K.'s land would be held to be invalid. A special meeting of the City Council was called. Utilizing the emergency provisions of the City charter, the Council empowered the law director to enter into a consent judgment on behalf of the City, declaring that S-5 zoning of T.E.K.'s property was unreasonable, arbitrary, discriminatory and confiscatory and that the restricted use was unconstitutional; and that portions of the property would be rezoned so

as to allow the proposed development. The State trial court entered a consent judgment to this effect on August 22, 1973, interposing a number of requirements with which T.E.K. agreed to comply in developing the Land.

Plaintiffs-appellants then filed the present action against the City, certain municipal officials and T.E.K. They contend that the Council's emergency action denied them their opportunity to petition for redress and their right of free speech to voice their opposition to the zoning change at a public hearing.

We agree with Judge Lambros that the plaintiffs-appellants have failed to establish a violation of federal [4] constitutional rights. The issues of State law raised by plaintiffs appellants on this appeal are matters for determination in the State courts of Ohio.

The judgment of the District Court is affirmed.

Filed July 9, 1975

No. 74-2270

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER DENYING PETITION
FOR REHEARING

Before PHILLIPS, Chief Judge, and CELEBREZZE and ENGEL, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.
John P. Hehman, Clerk

By /s/Grace Keller
Grace Keller
Chief Deputy

Filed August 14, 1975

No. 74-2270

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Before PHILLIPS, Chief Judge, and CELEBREZZE and ENGEL, Circuit Judges.

Upon consideration it is ordered that the motion to clarify judgment be and hereby is overruled.

Entered by order of the Court

/s/ John P. Hehman
CLERK

LOUIS A. TURI, Jr.
4169 River Street
Willoughby, Ohio 44094
(216) 951-2800
Attorney for Defendants Respondents
HAROLD E. BRICHFORD
JOHN R. ENGLEHART
RALPH PETTIFER
JOHN H. HAGER
CECIL R. LUTZ
HUGH D. PALLISTER
DONALD M. PARK
WILLIAM G. RYAN
JOHN TIGUE, Sr.
THE CITY OF WILLOUGHBY

JOHN G. CARDINAL
500 Lake County National Bank Building
Painesville, Ohio 44077
(216) 352-3375 & (216) 942-7790
Attorney for the Defendant Respondent
T.E. K. & ASSOCIATES

NANCY BUCKLEY
THOMAS D. BUCKLEY, Jr.
132 Maple Street
Chagrin Falls, Ohio 44022
(216) 247-7533
Attorney and Counsel for the Amicus Curiae the
THE AMERICAN CIVIL LIBERTIES UNION OF GREATER
CLEVELAND

SUPREME COURT, U. S.

FILED

NOV 29 1975

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-539

CHRISTOPHER J. AQUILA, WILLIAM G. AYLWARD, CARL A. DODARO, JR., DIANNE F. DODARO, JOSEPHINE A. HOWELL, EILEEN PLUMMER and BRUNO VITLONE,

Petitioners

vs.

HAROLD E. BRICHFORD, RALPH PETTIFER, CECIL R. LUTZ, HUGH D. PALLISTER, DONALD M. PARK, WILLIAM G. RYAN, THE CITY OF WILLOUGHBY, A Municipal Corporation

Respondents

BRIEF FOR THE RESPONDENTS, Harold E. Brichford, Ralph Pettifer, Cecil R. Lutz, Hugh D. Pallister, Donald M. Park, William G. Ryan, and the City of Willoughby

---

Louis A. Turi, Jr.
Director of Law
City of Willoughby
Ohio
Attorney for these
Respondents,
4169 River St.
Willoughby, Ohio
Phone 216-951-2800

November 24, 1975

OTHER COUNSEL OF RECORD:

Ralph Rudd,
Rudd, Karl, Sheerer, Lybarger
and Campbell Co., L.P.A.
33 Public Square, Suite 210
Cleveland, Ohio 44113
216-241-3646
Attorneys for Petitioners

John G. Cardinal
500 Lake County National Bank Building
Painesville, Ohio 44077
216-352-3375
Attorney for the Defendant Respondent
T.E.K. & Associates

Nancy Buckley
Thomas D. Buckley, Jr.
132 Maple Street
Chagrin Falls, Ohio 44022
216-247-7533
Attorney and Counsel for the Amicus
Curiae the American Civil Liberties
Union of Greater Cleveland

INDEX

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

RESPONDENTS NOTE iii

CERTIFICATE OF SERVICE iv

(a) OPINIONS BELOW 1

(b) GROUNDS OF JURISDICTION 1

(c) CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES 1

(d) QUESTIONS PRESENTED FOR REVIEW 2

(e) STATEMENT OF THE CASE 2

(f) SUMMARY OF ARGUMENT 5

(g) ARGUMENT 6

CONCLUSION 14

APPENDIX I I

APPENDIX II II

TABLE OF AUTHORITIES

Cases	Page
46 Am. Jur. 2nd "Judgment" Section 28	11
Black's Law Dictionary, Fourth Edition	10
Brigido Urbino v. Porto Rico Ry Light & Power Co. 68 F. Supp. 841	13
Constitution of the United States Article III, Sect. 2	7
49 Corpus Juris Secundum Section 173	14
Ellis v. Dyson -US-, 44 L. Ed. 274, 95 S. Ct.	9
Revised Code of Ohio Section 731.28	8
Stiffel v. Thompson 415 US 45s 39 L. Ed 3d, 505, 94 S Ct. 1209	9
United States vs. Swift & Co. 286 US 106, 76 L. Ed. 999, 52 S Ct. 460	14
Worth vs. Seldin US 45 L. Ed 2d, 343, 95 S Ct.	6

RESPONDENTS' NOTE

In order to avoid some confusion, respondents have elected to follow petitioners use of references to the items in the appendix of the Circuit Court of Appeals by reference such as: "(A 66)".

Reference herein to any matter of the appendix of this brief are referred to as "(Resp. App. I or II.)

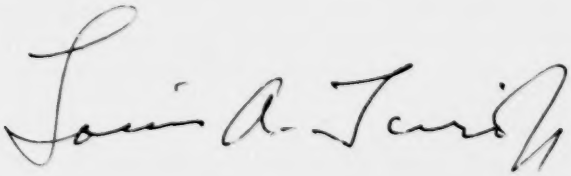
CERTIFICATE OF SERVICE

Three copies of the Brief for the Respondents, Harold E. Brichford, Ralph Pettifer, Cecil R. Lutz, Hugh D. Pallister, Donald M. Park, William G. Ryan and the City of Willoughby have been served this 26th day of November 1975 by United States Mail upon the attorney for each of the parties of records in the court below, that is:

Upon Ralph Rudd; Rudd, Karl, Sheerer, Lybarger and Campbell Co. L.P.A., 33 Public Square, Suite 210, Cleveland, Ohio 44113 phone 216,241-3646, attorney for Petitioners.

Upon John G. Cardinal, 500 Lake County National Bank Building, Painesville, Ohio 44077, phone 216,352-3375, attorney for the defendant respondent T.E.K. and associates;

And upon Nancy Buckley and Thomas D. Buckley, Jr., 132 Maple Street, Chagrin Falls, Ohio 44022, phone 216,247-7533, attorney and counsel for the amicus curiae the American Civil Liberties Union of Greater Cleveland.



Louis A. Turi, Jr.

(a)

OPINIONS BELOW

The opinions of the District Court were filed on November 21, 1973, and June 24, 1974. They were not published.

The opinion of the Court of Appeals was filed on June 6, 1975, and was not published.

All three opinions are found in the Petitioners Appendix, (29a) (40a) and (42a).

(b)

GROUNDS OF JURISDICTION

These respondents elect, under Rule 40(3), not to include comment on jurisdiction.

(c)

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

In addition to the provisions, statutes, etc., referred to in petitioners brief, these respondents contend that the following statute and constitutional provision are involved:

1. Ohio Revised Code Section 731.28
2. Article III, United States Constitution.

(d)

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Sixth Circuit err in affirming the order and findings of the District Court?

2. Do the petitioners have the right or standing as tax payers, citizens and residents of the City of Willoughby, Ohio, without alleging any injury sufficient to meet the "case or controversy" requirement within the meaning of Article III of the United States Constitution?

(e)

STATEMENT OF THE CASE

Petitioners filed an action in the Federal Court for the Northern District of Ohio, Eastern Division, on September 7, 1973, praying that certain action taken by the Council of the City of Willoughby, Ohio, in a matter involving local property zoning be set aside; that a judgment of the Court of Common Pleas of Lake County, Ohio, be bypassed or held for naught and prayingfurther that the Council of the City be ordered, by way of a mandatory injunction, to pass "valid" zoning regulations on the affected private property.

The private property involved is a parcel of land in excess of 200 acres in Willoughby, approximately 100 acres of which was developed as a golf course, the remainder was entirely undeveloped. North of this property is a commercial airport, the zoning of which allows air fields and various companion light industrial and commercial uses. Westerly of the property is a public highway, highly traveled, westerly of which the land is zoned for limited industrial use. Southerly of this property is a development of single family homes on 60 foot lots. The easterly boundary of this property is the corporate line between the City of Willoughby and the City of Mentor, Ohio.

The property was, prior to September 20, 1972, zoned S-5, which allowed only one single family dwelling on a lot containing a minimum of five acres of land. This zoning classification was originally placed on the land at a time when there was no sanitary sewer service available in the area.

On September 20, 1972, the Council passed, and the Mayor signed, a rezoning ordinance allowing the owner, hereinafter referred to as T.E.K., to develop the property at a density of approximately 8 units per acre on the undeveloped land with a covenanted provision that the 100 acre golf course would stay intact for a minimum period of 20 years and allowing the City the right of first refusal to purchase in the event the developer should ever, during said period desire to sell the land.

These petitioners, as noted in the second paragraph on page 11 of their brief, attempted to defeat that rezoning and retain the status quo by circulating a referendum petition which the City found inadequate; petitioners, then brought the matter into the Common Pleas Court seeking to have the court order a referendum election or, in the alternative, to declare the ordinance void on a technicality. This, the court did and by virtue of petitioners own court action, the S-5 zoning remained in effect.

The Council of the City of Willoughby thereafter, elected to attempt to defend the S-5 zoning in an action which was filed against the City by the property owner T.E.K. on May 14, 1973. Petitioners took no part in this action and made no attempt to intervene therein.

The case came to trial on August 20, and 21, 1973 and was duly heard by the Court and went to judgment on August 22, 1973. (A-66)

Following the conclusion of the trial of this second State Court case, (T.E.K. vs. Willoughby) it was apparent to the City's legal counsel that the decision was going to be adverse to the City, and he advised the Council to authorize what was termed (perhaps not too accurately) a "Consent Decree". (A-46) The orders of the "Consent Decree" limited the use of the T.E.K. property in the same manner that the Council had attempted to limit it previously. The judgment in that case is found at A-66, Resp. App.

SUMMARY OF ARGUMENT

These respondents feeling at the time of this draft, that their argument may not exceed twenty pages, nevertheless, point out that the Circuit Court of Appeals did not err in affirming the District Court's Order herein; that the District Court's order was not in error. The complaint of petitioners alleged a conspiracy, and hence was able to survive the Motion to Dismiss.

The record, an agreed stipulation of matters of record, plus comments of Counsel, failed to show any evidence of the alleged conspiracy in violation of the Civil Rights Acts. The petitioners have made no allegation or claim that they have been damaged herein other than what may have been suffered or sustained by the general public of the City of Willoughby. Therefore, they have no right or standing to bring this action.

No pendent jurisdiction as to state issues was exercised by the District Court, rather, (A-74, the last sentence of the first paragraph) that Court specifically abstained from assuming jurisdiction of what appeared to be a state issue.

The Circuit Court of Appeals in affirming the District Court, adding the comment as to state issues, (Petitioners' Appendix 44a) did not "---Remit---" as claimed by petitioners in their Question 5 page 4, Petitioners brief.

The action of the City of Willoughby in attempting to defend the S-5 zoning, which resulted from the action of the petitioners themselves, and the City's termination of the State Court attack thereon was no violation of petitioners' rights under any Civil Rights Statutes.

(g)

ARGUMENT

Did the District Court err in holding that the actions of the City did not violate any of the petitioners civil rights?

At the outset, we propose that if there were any error on the part of the District Court, then it was when the District Court failed to grant these respondents' original motion to dismiss — unfortunately, we did not argue or brief the question of lack of standing in the Courts below, hence, the District Court, through our error, did not consider this question of standing. We did not then have the benefit of **Worth v. Seldin,** -US- 45 L. Ed 2nd 343, 95 S Ct — decided June 25, 1975. The Lawyer's Edition Headnotes at Page 345

> "4. When the harm asserted by plaintiff is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of federal jurisdiction."

"5. Even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement of Article III of the Federal Constitution, he generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

"9. To show standing, the plaintiff must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."

We quote further from the opinion page 355 of the Lawyers Edition:

"(4,5) Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.---"

"6,7a,8a, 9, 10) ---Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art III's requirements remains; the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E.g., United States v. SCRAP, 412 US 669, 37 L Ed 2d 254, 93 S Ct 2405 (1973). ---"

Petitioners have contended in the District Court, the Court of Appeals and now in this Court, that the Council of Willoughby violated their Civil Rights in not changing the zoning of the T.E.K. property before the trial of T.E.K. in the State Court.

Petitioners were responsible for the 5 acre zoning remaining on the property through their own action in State Court. They litigated and defeated Council's decision to change the zoning. Now, when Council elected to defend petitioners' desired status quo, and became aware it was a losing battle, the Petitioners for the first time, in their District Court Complaint, Paragraph No. 10, admit the 5 acre minimum zoning to be invalid -A-8 Stipulations A-24, A-25. By what rule of logical fairness or law can they now complain that Council's failure to have corrected petitioners' S-5 zoning violates their (petitioners) Civil Rights?

Petitioners attempt to disguise the claimed generalized grievance as an excuse to invoke relief under Federal Statutes and this judicially should not be allowed. The gates of the Federal Courts would be open to torrents of attempts to settle purely local issues. This, certainly, is not the stated function of Civil Rights Statutes in Chapter 42, USC, nor did the Congress ever intend it so. Petitioners, had they felt the public interest was not being served by the invalid zoning, could have taken action by way of Initiative Petition under Ohio Revised Code Section 731.28 (Resp. App. II) or, they could have sought intervention in the State Case, **T.E.K. v. Willoughby.** They did neither.

Ordinarily, in a case involving a violation of a person's Civil Rights, the rule that state judicial or other remedies must first be exhausted is not applicable. **Steffel v. Thompson** 415 US 452, 39 L Ed 2d 505, 94 S Ct. 1209 (1974).

This Court, however, in **Ellis v. Dyson** US , 44 L Ed 274, 95 S Ct , while affirming the general rule on exhaustion of remedies added, at page 281 of the Opinion in the Lawyers Edition,

> " --- We did require, however, that it be clearly demonstrated that there was a continuing, actual controversy as is mandated both by the Declaratory Judgment Act. 28 USC Sec. 2201 (28 USCS Sec. 2201), and by Article III of the Constitution itself.---"

Respondents contend that what this means, and it is equitable and in the spirit of the law, that if there is no standing, then the petitioner should or should have, exhausted his state remedies.

Finally, in defense of the correctness of the holdings of both the Sixth Circuit Court of Appeals and of the District Court we wish to point out that the Questions of Law 3, 4 and 5 presented by Petitioners are synthetic and semantically contrived so as to provide a basis for the pages of legal argument following. That argument has no real relationship to the actual issues herein.

In order to evaluate the correctness of the orders and opinions below, it is necessary to read the actual orders and opinions in relation to the Complaint; and further, to observe the record or perhaps we should say the lack of record, in that no evidence was attempted to be introduced by Petitioners to support claims of conspiracy or violations of Civil Rights.

THE "CONSENT JUDGMENT"

We fail to understand the Petitioners' objections to the findings of the State Court in T.E.K. v. Willoughby, (A-66, Trial Court Joint Exhibit 7) in view of the fact that the legal findings therein concur with the Respondents own appraisal of the invalidity of S-5 zoning (A-8, A-24, A-25).

The Judgment shows that the cause was "---duly heard---" (A-66.

"Duly" is defined in **Black's Law Dictionary** Fourth Edition Page 591 as:

> "DULY, in due or proper form or manner; according to legal requirements.
>
> Regularly; properly, suitable; upon a proper foundation, as distinguished from mere form; according to law in both form and substance."

We point out that the State Court proceeded to make its findings of fact and declarations, determinations or conclusions of the law, not until then did the Court include the "Consent" portion of the entry, to-wit: The conditions and terms **limiting** the use of the property which the Court had found as a matter of law to be unlimited.

The District Court noted these limitations on the property and the public interest to be served thereby in its opinion, Page 8 where the Court stated at (A-79)

> "---Council might well have been faced with a situation in which the property was unzoned and in which there would be no control on the development thereon---"

(We reiterate Petitioners **own** action had placed Council in this position.)

Judgments are presumed to be valid. **46 Am Jur. 2d, Judgments Part C, Presumptions in general, Section 28,** starting at page 332, we find the following:

> "A judgment is not, under general rules, applicable to the subject, presumed to be erroneous, but, to the contrary, is presumed to be valid until vacated by some proper proceeding instituted directly for the purpose of correcting errors therein, where the judgment is within the jurisdiction of the Court rendering it. Under such circumstances the judgment so rendered raises a presumption that the Court acted impartially, honestly, justly, after due consideration, correctly, in conformity to law, and in accordance with its duty. This presumption of the validity of a judgment extends to all matters in the various stages of the proceeding, from its initiation to its completion. It is presumed, in support of the judgment, that the proceedings were regular, in conformity with settled usage, and sufficient to support the judgment, and that every requisite, and every fact necessary to sustain the judgment, were present.

> These rules are particularly applicable to a judgment rendered after a trial upon the merits, as to which every reasonable doubt will be resolved in favor of the judgment. It has been declared that the integrity and value of the judicial system as an institution for the administration of justice rest largely upon these principles. However, a presumption in favor of the validity of a judgment will not be indulged where it is in violation of an express statutory requirement."

We wish to point out further, that as to both consent judgments and judgments generally, the burden of upsetting the same is on the attacker. We certainly accept and acknowledge the fact that if a decree of the Court has been the result of any fraud or collusion, then, certainly, it would be open to question and should be vacated.

In the instant case, however, Petitioners want it vacated and set aside merely on their suspicion of conspiracy, fraud and collusion. Unfortunately, they have offered no evidence in this direction nor have they taken advantage of their opportunity for ascertaining whether any such elements were present. The presumption of validity of the judgment and findings are real and must be acknowledged in the absence of any evidence to the contrary.

An unfortunate fact is the styling "consent judgment" given by all parties in this case to the entire entry in the State Court action. This was wrong. The facts under the law indicate that it was a valid adverse judgment.

A judgment is separate and distinct from the findings and conclusions of law of a Court although very often, as in the instant case, findings of the Court are incorporated in the same instrument as the judgment. In the State Case the record shows that the case was tried to the Court, the findings of fact, conclusions and the judgment that followed were after completion of the trial. There is no question that the Court had jurisdiction of the parties and the subject matter, heard evidence and the exhibit speaks for itself starting at A-66. This judgment was a **joint exhibit of the parties**. Petitioners have not sought to contravert any of the findings and conclusions therein. Even though the judgment has been styled a "consent judgment" it, in fact, as to the findings and conclusions, is not. A judgment by consent, while distinct from a judgment rendered by a Court after a hearing and consideration of the evidence in a case, nevertheless, in the absence of fraud or collusion, is given all the honor and presumptions given any other judgment. **Brigida Urbino vs. Porto Rico Ry. Light & Power Co.** 68 F Supp. 841.

> "Syllabus 1.
> In absence of fraud, consent judgment entered by court of competent jurisdiction over subject matter and parties is conclusive on parties to same extent as judgment rendered on controverted facts and after contested trial, and hence operates as res judicata between same parties in second action involving same cause of action.
>
> Syllabus 2.
> A "consent judgment" is not a mere authentication or recording of an agreement between parties, but is judicial act involving exercise of judicial power."

A judgment does not become a judgment by consent even though the parties have added their consent to the adjudication of the Court. **49 CJS Judgment Sy 173 Page 309.**

In the judgment of the State Court, the Court does not commence to note the agreed matters until after noting findings (A7)) stating:

> "---Further,--- the Court adopted as its continuing order the agreement of the parties as hereinafter set forth---".

The United States Supreme Court has spoken with regard to consent judgment, generally, and the consent judgment is an often utilized type of entry in the Federal Court System, see **United States vs. Swift and Company,** 286 U.S. 106, 76 L. Ed. 999, 52 S. Ct. 460. In Swift the Court held that consent decrees are not to be regarded as mere agreements but as adverse judgments.

Do the petitioners have the right or standing as taxpayers, citizens and residents of the City of Willoughby, Ohio, without alleging any injury sufficient to meet the "case or controversy" requirement within the meaning of Article III of the United States Constitution?

Respondents answer is NO. We refer the Court to our previous discussion on this question, further argument would only be redundant.

CONCLUSION

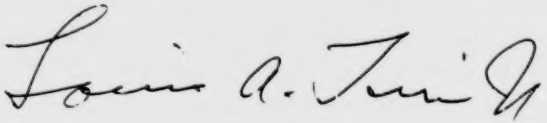
In Conclusion, Respondents submit:

A. They request the Court to examine the opinions below and to analyze the Petitioners self-serving characterizations such as "Rezoned by Consent Decree".

B. They request the Court to affirm the Courts below, and to deny the Writ requested by petitioners.

C. They request the Court to honor the validity of the judgment of the State Court which validity was recognized by the Courts below, by affirming the decisions of said Courts.

Respectfully submitted,



Louis A. Turi, Jr.
Director of Law
City of Willoughby, Ohio
Attorney for these
Respondents.
4169 River St.
Willoughby, Ohio
216-951-2800

CONSTITUTION OF THE UNITED STATES

ARTICLE III

[JUDICIAL DEPARTMENT]

§1 The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§2 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;---to all Cases affecting Ambassadors, other public Ministers and Consuls;---to all Cases of admiralty and maritime Jurisdiction;---to Controversies to which the United States shall be a Party;---to Controversies between two or more States;---† between a State and Citizens of another State;---between Citizens of different States;---between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

REVISED CODE OF OHIO

SECTION 731.28

[INITIATIVE AND REFERENDUM[

§731.28 Ordinances and measures proposed by initiative petition.

Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the municipal corporation.

When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, certify the text of the proposed ordinance or measure to the board of elections. The auditor or clerk shall retain the petition.

The board shall submit such proposed ordinance or measure for the approval or rejection of the electors of the municipal corporation at the next succeeding general election, occurring subsequent to ninety days after the certifying of such initiative petition to the board of elections. No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the measure in such municipal corporation shall be subject to the veto of the mayor.

HISTORY: GC § 4227-1; 102 v 521, § 1; 103 v 211; 104 v 238; 125 v 713 (730); 126 v 205(208). Eff 1-1-56. The act, of which GC §§4227-1 to 4227-5 were a part, was declared by the legislature to be an emergency measure, 103 v 211 (213), §3.

LIBRARY

Supreme Court, U. S.
FILED
JAN 6 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-539

CHRISTOPHER J. AQUILA, WILLIAM G. AYLWARD, CARL A. DODARO, JR., DIANNE F. DODARO, JOSEPHINE A. HOWELL, EILEEN PLUMER and BRUNO VITLONE,

Petitioners

vs.

HAROLD E. BRICHFORD, RALPH PETTIFER, CECIL R. LUTZ, HUGH D. PALLISTER, DONALD M. PARK, WILLIAM G. RYAN, JOHN TIGUE, SR., THE CITY OF WILLOUGHBY, A Municipal Corporation, and T.E.K. & ASSOCIATES, A Partnership,

Respondents

REPLY BRIEF OF PETITIONERS

Ralph Rudd,
Rudd, Karl, Sheerer, Lybarger and Campbell Co., L.P.A.
33 Public Square - Suite 210
Cleveland, Ohio 44113
Phone (216) 241-3646
Attorneys for Petitioners

January 7, 1976

(Attorneys for Respondents on Inside of Back Cover)

TABLE OF CONTENTS

		Page
TABLE OF CONTENTS		i
TABLE OF AUTHORITIES		ii
ARGUMENT		1
I	STANDING	1
II	THE S-5 ZONING	4
III	ELLIS v. DYSON	6
IV	THE CLAIM OF NO EVIDENCE	7
V	PRESUMPTION OF VALIDITY OF JUDGMENTS	8
VI	CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Page

Brigida Urbino v. Puerto Rico Railway, Light, & Power Company, 68 F Supp 841..... 9
Ellis v. Dyson, ___U.S.___, 95 S Ct 1591, 44 L Ed 274, 1975..... 6
Ex Parte Levitt, 302 US 633, 58 S Ct 1 82 L Ed 493, 1937..... 4
Huffman v. Pursue, Ltd., 420 US 592, 95 S Ct 1200, 43 L Ed 2d 482, 1975..... 6
Schlesinger v. Reservists Committee to to Stop the War, 418 US 208, 94 S Ct 2925, 41 L Ed 2d 706, 1974..... 4
Steffel v. Thompson, 415 US 452, 94 S Ct 1209, 39 L Ed 2d 505, 1974..... 4
U.S. v. Richardson, 418 US 166, 94 S Ct 2940, 41 L Ed 2d 678, 1974..... 4
U.S. v. SCRAP, 412 US 69, 93 S Ct 2405, 37 L Ed 2d 254, 1973..... 4
Warth v. Seldin, ___U.S.___, 95 S Ct 2197, 45 L Ed 2d 343, 1975..... 1,4
Younger v. Harris, 401 US 37, 91 S Ct 746, 27 L Ed 2d 669, 1971..... 6

U.S. CONSTITUTION

Fourteenth Amendment..... 9

Page

WILLOUGHBY CITY CHARTER

Article VI, Section 3, 13a..... 9

U.S. CODE

42 U.S.C. Section 1983..... 9

ARGUMENT

I. STANDING

For the first time in this litigation the respondents' Answer Brief challenges the petitioners' standing to bring the action. Respondents rest their claim on Warth v. Seldin, ____U.S.____, 95 S Ct 2197, 45 L Ed 2d 343, 1975. They rest upon the proposition of Warth that when the harm asserted by a plaintiff is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. ____U.S.____, 95 S Ct at 2205, 45 L Ed 2d at 355.

But here the petitioners are citizens, electors, and taxpayers who specifically undertook to oppose by exercise of their rights of speech and petition the re-zoning that the respondents put into effect by consent decree, a means of legislation that violated the Willoughby City Charter and Ordinances and deprived the petitioners of their rights of hearing and their conditional rights of referendum.

When the re-zoning was first attempted by ordinance the petitioners circulated a referendum petition to bring it to a vote of the people. When their referendum petition was rejected by the city finance director the petitioners sued in Common Pleas Court to enforce their right of referendum, or, alternatively, to invalidate the ordinance on the ground that it had not been passed within 60 days after the Council's hearing of it. They prevailed on the alternative ground, and the referendum issue was mooted. But then, instead of enacting the ordinance by correct procedure, which would have given the petitioners their opportunity to participate in public hearings and their conditional right of referendum, the respondents pur-

portedly adopted by consent decree the very zoning that the plaintiffs opposed, but the consent decree gave no opportunity for the petitioners to participate in public hearings.

The plaintiffs had specific ideas and reasons for opposing the re-zoning.

Paragraph 6 of their Complaint is as follows:

> 6. Among the reasons for each of which one or more of the plaintiffs sought to exercise their right of referendum were a belief that dense residential construction adjacent to the airport would produce an unsafe, unsound, and unstable residential community; a belief that such density of residential construction would not be in keeping with the standards and character of the rest of the community and would be conducive of high levels of air and noise pollution, a low proportion of vegetation to help overcome air pollution, high traffic densities and consequent noise and air pollution therefrom, and overcrowding of the population and consequent high levels of interpersonal tension and crime; a belief that such a large increase of population as would result from the proposed development would cause increased loading of the facilities for supply of water, sewage disposal, garbage and trash disposal, and access of traffic and either impair the services or burden the plaintiffs and other citizens and taxpayers with additional costs, or both; a belief that the increase in population would cause a need for expansion of school facilities with increased costs to the school district at large; and a belief

that such an increase in the population would so change the character of the community that it should not be undertaken without an opportunity for the people to vote their approval or disapproval thereof.

Paragraph 10 of the Complaint (A 8) is as follows:

> 10. Article VI Sec. 3 of the Charter of the City of Willoughby says in part as follows:
>
> > The Council shall by ordinances adopt a comprehensive general plan for the orderly development of the city and plans for the re-development of areas or districts therein. . . .
>
> The defendant Mayor and Councilmen knew that the S-5 zoning of the T.E.K. land would probably be held constitutionally invalid. Nevertheless they failed to enact by the means provided by the Charter and ordinances of the City of Willoughby and the laws of the State of Ohio any new and probably valid zoning for the said land. Such means would have included an opportunity for the plaintiffs to present their views and the knowledge and views of experts in hearings before the Planning Commission and the Council and an opportunity if they wished to take any new zoning that might be enacted (unless enacted by emergency procedures) to the people by referendum.

Thus the petitioners specifically sought and still seek to exercise the rights of speech and petition of which the defendants' illegal action

deprived them. They are like the plaintiffs in U.S. v. SCRAP, 412 U.S. 69, 93 S Ct 2405, 37 L Ed 2d 254, 1973, who were held to have standing because they used the forests, rivers, streams, mountains, and air that they sought to protect by their action and paid increased taxes because of the costs of disposing of otherwise reusable waste materials. Petitioners here are like the plaintiff in Steffel v. Thompson, 415 U.S. 452, 94 S Ct 1209, 39 L Ed 2d 505, 1974, who was held to have standing to sue because he had specifically engaged in protest hand-billing in a shopping center and had been forced to desist by police threats to arrest him for violation of the Georgia criminal statute if he did not desist.

Petitioners here have an interest far more direct, specific, and personal than the generalized interest of all or most citizens of the community in having the laws and ordinances obeyed, as in having the city's zoning laws enacted by ordinance instead of by court decree. Warth v. Seldin, supra, is certainly distinguishable. So are the cases it cites for the proposition that respondents rely on, Schlesinger v. Reservists' Committee to Stop the War, 418 U.S. 208, 94 S Ct 2925, 41 L Ed 2d 706, 1974; U.S. v. Richardson, 418 U.S. 166, 94 S Ct 2940, 41 L Ed 2d 678, 1974; and Ex parte Levitt, 302 U.S. 633, 58 S Ct 1, 82 L Ed 493, 1937.

II. THE S-5 ZONING

The respondents' discussion of the S-5 zoning on page 8 of their brief is, to coin a paradox, a transparent obfuscation.

The petitioners' goal has never been to retain the S-5 zoning, but to prevent the creation of a dense residential zone next to the airport,

which is what the respondents were attempting to do by their invalid ordinance of 1972 and, as petitioners claim, their even more invalid consent decree of 1973.

Petitioners have sued twice because they want a fair opportunity to prevent a particular pattern of zoning toward which the respondents are bent; because if the respondents' will is to prevail over that of the petitioners, the respondents' victory should be at least fair and square, not by a procedurally invalid ordinance, not by what petitioners thought was a trumped up claim of invalidity of the petitioners' referendum petition (this claim now being moot), and not by re-zoning enacted by consent decree instead of by ordinance with fair and square opportunities for the two hearings and the conditional right of referendum. As for the Council's failure to correct the S-5 zoning before the trial even though its members expected it would be held invalid, this seems to petitioners to have been simply a means to avoid the fair and square and lawful ordinance procedure and use instead the illegal consent decree with an appearance of justification for it through the "emergency" manufactured by the Council's failure to act promptly on a lawful ordinance.

It is true that petitioners could have taken action by way of initiative petition. However, it was not their responsibility to enact valid zoning but the Council's. And if they had attempted to re-zone the land by initiative petition in a manner different from that desired by the respondents, their efforts very likely would have been defeated even if the people voted in favor of the initiative measure by action of the land owners establishing a prior use inconsistent with the initiative measure but pursuant to the zoning adopted by the respondents. The initiative did not and does not seem to be an appropriate remedy for the petitioners to have used.

Nor did it seem appropriate for the petitioners to intervene in the state case, T.E.K. v. Willoughby. The petitioners had no particular interest in the validity or the invalidity of the S-5 zoning. They did not anticipate and it does not seem reasonable to suggest that they should have anticipated that that lawsuit would be terminated by a decree affirmatively adopting a new pattern of zoning, since the city charter required re-zoning to be done by ordinance. After the decree was entered the petitioners could have attempted to intervene in the state case to attack the decree, but, especially at that date, it seemed preferable to attack the decree in the federal courts where it was assumed that plaintiffs would be better assured of fair consideration of their First Amendment rights.

III. ELLIS v. DYSON

We do not understand how Ellis v. Dyson, ____ U.S.____,95 S Ct 1591, 44 L Ed 274, 1975, is thought to be helpful to the respondents. If anything, it seems to lend further support to the right of the petitioners to pursue their claim in the federal courts. They were not parties to the state case, T.E.K. v. Willoughby, and so had no obligation to pursue their rights there according to Younger v. Harris, 401 U.S. 37, 91 S Ct 746, 27 L Ed 2d 669, 1971, or Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S Ct 1200,43 L Ed 2d 482, 1975. And there seems to be no basis for suspicion that petitioners' claims in this case are now moot. For whatever reasons, the land owner has not yet obtained a building permit and, we understand, has not taken any action that would constitute a prior use inconsistent with any new zoning that might be validly adopted in the future.

If the respondents' brief intends to say only that if petitioners had no standing in federal

court they could get no remedy except in state court, that of course is a truism we do not contest.

IV. THE CLAIM OF NO EVIDENCE

On page 10 the respondents' brief asserts, "... no evidence was attempted to be introduced by petitioners to support claims of conspiracy or violations of Civil Rights."

This seems less than candid.

The evidence was introduced by stipulation.

It included the Charter, Ordinances, Council resolution, and consent decree. It included the respondents' admissions of many of the allegations of the complaint. This evidence plainly demonstrates, we submit, the violation of the petitioners' civil rights.

The stipulated evidence included the fact that the landowner bought the land while it was still zoned S-5. Complaint, ¶ 3, A6; Answer of defendants other than T.E.K., A15; Stipulations A19. It is not a far fetched inference that the landowner before paying $1,975,000 (A-41) borrowed at high interest (A-42) would have obtained satisfactory assurances from the City that the desired re-zoning would be accomplished.

The stipulated evidence included the fact that the City's finance director (appointed by the Mayor with the confirmation of Council - Joint Ex. 1, Art. V, Sec. 1, Record) declared invalid the referendum petition of 782 purported signatures although 527 were required. Complaint, ¶5, A-7; Answer of defendants other than T.E.K., A-15; Stipulation, A-21.

The stipulated evidence included the fact that the members of Council believed the S-5 zoning would be held invalid, the fact that there was ample time in which to enact new zoning in the prescribed manner before the trial of T.E.K. v. Willoughby and the fact that they did not enact new zoning when they could, although they previously had done so (more than 60 days after the Council hearing) and did so again by entering the consent decree. The only substantial difference we can see between the circumstances of 1972 when the Council enacted the new zoning by ordinances and those of 1973 when it did not is that by 1973 the Councilmen knew that petitioners opposed the new zoning, would oppose it in the hearings, and would oppose it by referendum petition unless it was passed by emergency procedures. These facts, we believe, are evidence of motivation and conspiracy to deprive petitioners of the hearings and referendum.

V. PRESUMPTION OF VALIDITY OF JUDGMENTS

On pages 11 and 12 of the respondents' brief it quotes from 46 Am. Jur. 2d 332 a statement that a judgment is presumed to be valid.

But the force of the quotation as it might be applied here in support of the respondents is utterly avoided by its last sentence:

> "However, a presumption in favor of the validity of a judgment will not be indulged where it is in violation of an express statutory requirement."

The judgment in question here, the consent decree in the Common Pleas Court, is clearly in violation of the express requirement of the Willoughby

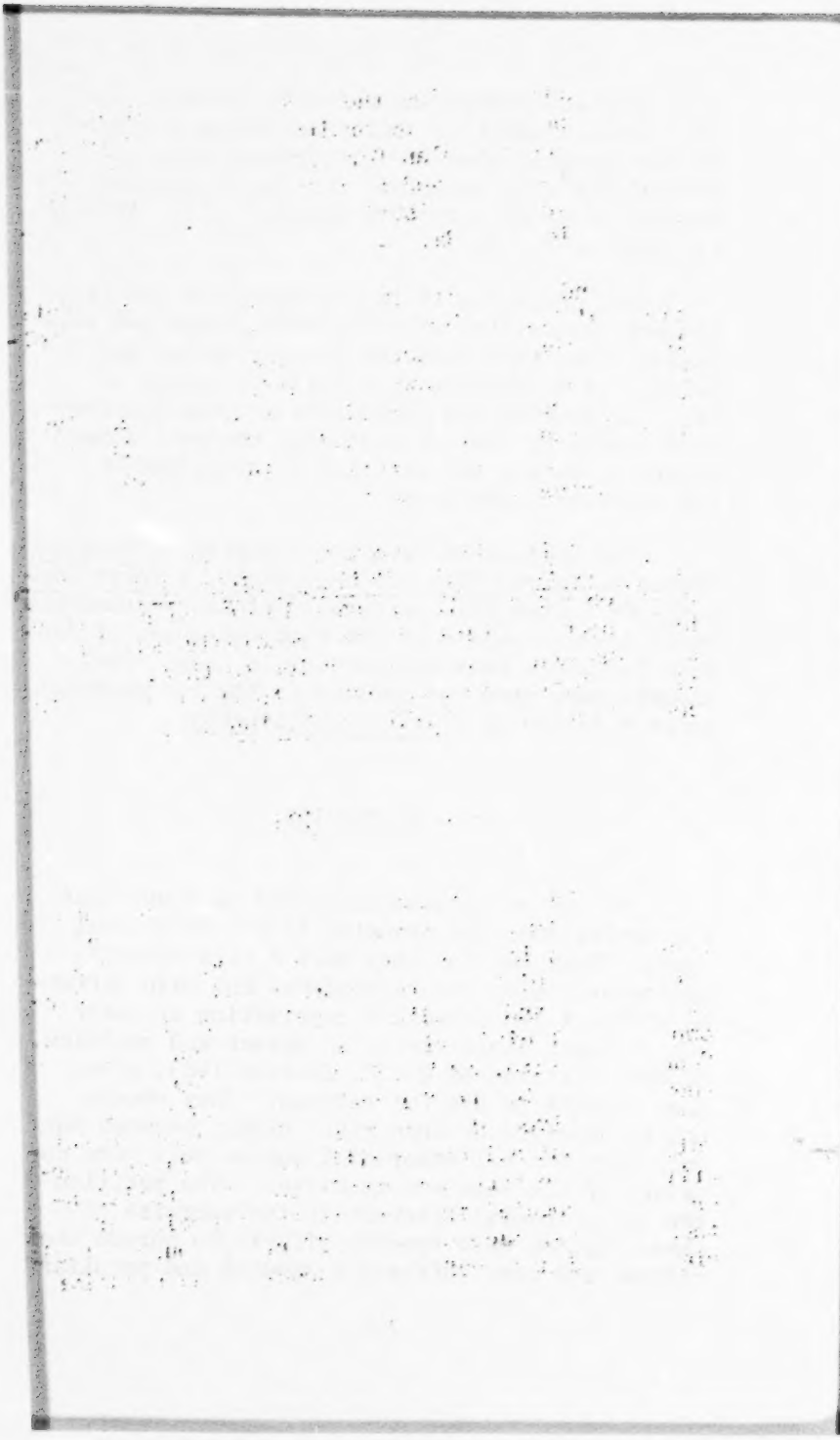
City Charter, having the force of statute, that "The Council shall by ordinances adopt a comprehensive general plan for the orderly development of the city and plans for the re-development of areas or districts therein ...." Article VI, Section 3, 13a.

And of course it is not merely on the petitioners' "suspicion of conspiracy, fraud and collusion" that they want the consent decree set aside. It is because of a plain violation of the city charter and ordinances and the deprivation caused by that violation of the petitioners' rights of speech and petition in violation of the Fourteenth Amendment.

The quotations from the syllabus of Brigida Urbino v. Puerto Rico Railway, Light, & Power Company, 68 F Supp 841, on page 13 of the respondents' brief seem to relate to the conclusiveness of consent judgments over the parties to them. Petitioners here were not parties to the respondents' consent decree in T.E.K. v. Willoughby.

VI. CONCLUSION

We see no reasonable ground to doubt that the petitioners had standing to sue in federal court. They had and they have a live specific controversy with the respondents and have suffered a direct and immediate deprivation of their own personal civil rights of speech and petition. Federal statute, 42 U.S.C. Section 1983, gives then a right to sue for redress. They should not be deprived of this right simply because not only they but all other citizens as well were deprived of the same opportunities. The petitioners had a special interest in the exercise of these rights, made special efforts to pursue their rights, and have suffered a special and peculiar



loss, especially if it is accepted, as petitioners believe, that at least part of the motivation for the respondents to have adopted the consent procedure instead of lawfully enacting an ordinance was to circumvent the petitioners' rights of speech and petition.

The district court utterly misconstrued the effect of the statutory and charter provisions for emergency legislation in holding that those provisions were a limitation not only on the right of referendum but also on the duty to enact re-zoning by ordinance with hearings before the Planning Commission and Council. In thus over-extending the effect of the emergency clause that the Council adopted with its resolution authorizing the consent decree, the district court erroneously concluded that the procedure the Council followed was lawful and thus did not deprive the plaintiffs of any rights.

The Court of Appeals refused to consider this error on which the District Court's judgment rested, but said the state questions were for the state courts and nevertheless affirmed instead of vacating the District Court's judgment. Thus the Court of Appeals failed to exercise its pendent jurisdiction but instead apparently attempted to abstain from deciding the state questions, yet failed to protect the petitioners' rights to go to the state courts pursuant to federal abstention by failing to vacate the state law decision on which the district court had rested its judgment, which the Court of Appeals affirmed.

We do not understand the position that the respondents have adopted as to what action should be taken by this Court. On the one hand they assert that the petitioners have no standing to sue, and if that were true the judgments of the District and Circuit Courts would have to be vacated. On the other hand the respondents ask this court to affirm the courts below and deny the writ of

certiorari requested by petitioners. Apart from the contradiction between affirmance and denial of certiorari, either of these actions would be contradictory to the idea that the petitioners do not have standing to take their case to the federal courts.

We urge that the petition for certiorari be granted.

Respectfully submitted,

Ralph Rudd

Ralph Rudd, Attorney for Petitioners

Of Counsel:

RUDD, KARL, SHEERER, LYBARGER
and CAMPBELL CO., L.P.A.
33 Public Square - Suite 210
Cleveland, Ohio 44113
Telephone (216) 241-3646

LOUIS A. TURI, JR.
4169 River Street
Willoughby, Ohio 44094
(216) 951-2800
Attorney for Defendants Respondent
HAROLD E. BRICHFORD
RALPH PETTIFER
CECIL R. LUTZ
HUGH D. PALLISTER
DONALD M. PARK
WILLIAM G. RYAN
JOHN TIGUE, SR.
THE CITY OF WILLOUGHBY

JOHN G. CARDINAL
500 Lake County National Bank Building
Painesville, Ohio 44077
(216) 352-3375 & (216) 942-7790
Attorney for the Defendant Respondent
T.E.K. & ASSOCIATES

NANCY BUCKLEY
THOMAS D. BUCKLEY, JR.
132 Maple Street
Chagrin Falls, Ohio 44022
(216) 247-7533
Attorney and Counsel for the Amicus Curiae the
THE AMERICAN CIVIL LIBERTIES UNION OF
GREATER CLEVELAND